No. 2639

United States

Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES.)

PABST BREWING COMPANY, a Corporation,
Plaintiff in Error,

vs.

E. CLEMENS HORST COMPANY, a Corporation,
Defendant in Error.

VOLUME II.
(Pages 257 to 460, Inclusive.)

Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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(Testimony of C. C. Sweeney.)

The COURT.—I am asking you what would be the occasion of putting such a term in a contract if it had no significance. You are an expert. You are not passing upon whether it has any significance or not. I am simply asking you why it was put in there.

A. It might be the power of the mind over matter. Some one suggested putting it in the*ir*. With reference to an air-dried hop, dried by the process used by Mr. Horst and another hop of the same general character dried by kiln-drying process, where they have both been equally well handled, it would be impossible to tell the difference between the product away from the kiln.

Q. Were you familiar with the value of the Cosumnes hops in the year 1912, in the month of November? A. I was.

Mr. DEVLIN.—I shall object unless the inquiry be confined to air-dried hops. [215]

The COURT.—He does not think that has any significance. I am bound to instruct the jury that it has. It characterizes the class of hops that are called for by this contract. Confine yourself to air-dried hops.

Mr. POWERS.—Exception.

Exception #78.

Q. Were you familiar with the value of air-dried Cosumnes hops in November, 1912?

A. I was. It was 18¾ cents.

Q. Between whom?

A. From grower to dealer here.

Q. What would be the value between the dealer and the brewer in the east?

(Testimony of C. C. Sweeney.)

A. 22 to 24 cents. Delivered to any eastern point and the freight would be taken from that. That would make the net value in California 20¼ to 22¼ cents. There was a market for air-dried Cosumnes hops in 1912 sufficient to take 2000 bales. That continued all during the month of November. We sell hops in September, October and November generally, and brewers buy hops at from 21 to 24 cents, delivered to the brewers. It would take a couple of months to have sold 2000 bales. The reasonable value of the services of a broker to sell hops of that kind to the brewers at that time in that particular year was one cent a pound. The dealer to pay his own expenses. I have never known a customer to pay a broker 1½ cents to 2 cents per pound and I have been thirty years in the business. In my opinion 2000 bales choice Cosumnes hops could be sold in November, 1912, provided there was a lowering in the price at that time below the price you named. There would be a good market for them. If we had cut the price one cent it would have taken two or three weeks to have sold them. I have examined samples one to twenty. [216]

[Testimony of F. G. Ernest Lange, for Plaintiff (Recalled).]

F. G. ERNEST LANGE, recalled.

Q. You said you were familiar with the entires that appear in the books. Will you kindly show me where those 2000 bales of hops are charged in your books to the account of Pabst & Company?

A. They are not charged to Pabst & Company.

(Testimony of F. G. Ernest Lange.)

Q. Now, you say that there were a certain 2000 bales of hops on November 4th, 1912, in certain warehouses. Will you show me the record of the whereabouts of those bales on November 4th, 1912?

A. I can show you some of the records. They are in several books. We did not bring them all here. I started out to do that with Mr. Farrell.

Mr. POWERS.—I move to strike out the answer as not responsive to the question.

The COURT.—The answer is responsive to the question. I do not propose to permit you at this time to go into a detailed examination of all of these entries. You may pick out one or two items. I have no disposition to keep anything from you that you have called for in the proper way, but the Court has got to protect itself and the jury against the delay that would issue from an examination of things of this kind in the courtroom that should have been examined outside.

Mr. POWERS.—I *except the* statement of the Court, because my understanding of the law is that when entries in books are referred to, that we have a right to examine those books.

The COURT.—Most assuredly you have.

Mr. POWERS.—Exception.

Exception #79.

Q. You furnished the Court a statement from a list of entries, a list of the bales that were in various warehouses. Show me where you got that list of bales from.

A. It is impossible to show now. They are in sev-

(Testimony of F. G. Ernest Lange.)
eral books, and it would take at least a week to show them all to you. [217]

Q. Show me one *to* them. Produce the exhibit that was filed here yesterday. You say there were 300 bales in Milwaukee. Will you kindly point out in the books where those 300 bales in Milwaukee were stored?

(Witness refers to entry under date of October 31st.) It is either that or this or that. There are 300 bales of those 400 bales here.

Q. The witness refers to entry under date of October 31st, Merchants Storage and Transfer Company, 100 bales, lot 461; 100 bales, lot 462.

The COURT.—Ask him to state what that entry is and let him read it into the record in the regular way.

Mr. POWERS.—Mr. Witness, kindly read that.

A. 100 bales, lot 461.

The COURT.—What is the date?

A. The date shown in the warehouse. September 14th.

Mr. POWERS.—What is the next date?

A. September 11th, 100 bales, lot 462. September 14th, 100 bales, lot 464. September 14th, 100 bales, lot 465.

Q. Which of those 300 bales was in the warehouse on November 4th, 1912?

A. 100 bales, lot 461; 100 bales, lot 462; 100 bales, lot 465.

Q. Now, what date did those bales leave that warehouse?

(Testimony of F. G. Ernest Lange.)

A. I wish to amend the dates on that other one. I had the Milwaukee page. This is the warehouse company's actual page. Lot 464 was not in the warehouse. The only lots in the warehouse were, October 31st, 100 bales, lot 461; October 31st, 100 bales, lot 462; and October 31st, lot 465. They left the warehouse, 100 bales, lot 461, December 30th; 100 bales, lot 462, December 30th; 25 bales, lot 465, December 10th; 75 bales, lot 465, December 30th; I wish to say that these dates are only approximate dates. They are not the [218] dates they left the warehouse. They are the dates shown in this book they left the warehouse, but those are not the correct dates. They are only approximate dates.

Q. Where can we find the correct dates?

A. By looking through a great many files in San Francisco.

The COURT.—Now, Mr. Powers, tell me what the materiality of the particular date is when they left these warehouses?

Mr. POWERS.—They came in October, and if on November 4th, 2000 bales of them had gone out, there would not be 2000 bales on hand, and the method of computing the loss, if any, would be on a different basis.

Q. Show me where the 208 bales which were in Chicago on November 4th, 1912.

A. I cannot show by this book where those hops were, that is on November 4th, without referring to a great many entries. We have a great many entries in this book that are made prior to delivery, or

prior to shipment, and some of them subsequent.

Q. How does it come that they were entered in that way?

A. Mr. Horst explained it in his testimony the other day.

Q. I know he did, but I want you to explain.

A. We order out hops from San Francisco on shipping instructions. Those shipping instructions are entered in this book. We might order out hops a month or so before they go out of the warehouse, and the date they were ordered out is shown in this book.

The COURT.—Explain how that comes about, that they remain there so long after.

A. Our business is all handled from San Francisco and these lots are in the east. We make an order of shipment. Our instructions are to ship, and there is a line for a certain time and we order those hops to go out, and they may go out on shipment two weeks from now. We make an entry in the stock book the date we order them out. [219]

Q. Would it be possible for a representative, like Mr. Farrell, to take this book and check them over?

A. No, sir, it would not. The same thing holds good as to the 404 bales in New York.

Q. Show me where the entries are in the books.

A. I could not show you from this book.

Mr. POWERS.—I move to strike out the testimony with reference to Chicago and New York goods unless some entry is shown where they are contained in the books.

The COURT.—That is not the proper way to reach

(Testimony of F. G. Ernest Lange.)

it. I will deny that motion.

Mr. POWERS.—Exception.

Exception #80.

Q. You say there were 233 bales en route to the east?

A. Where is the record of that? I think I can get it for you. 100 bales of lot 513, were shipped on September 30. Order notify E. Clemens Horst Company, New York. Lot 507 was shipped to order notify E. Clemens Horst Company, New York, 100 bales, September 23d. I could not tell when they arrived in New York. Lot 506, 100 bales, was shipped from Brighton, September 17th. Order notify E. Clemens Horst Company, New York City. 30 bales, lot 518, shipped to order E. Clemens Horst Company, notify John Hohenadel. That entry does not mean we sold them to Hohenadel. It means that it is shipping to ourselves, notify him.

Q. How does that come in connection with the transaction? A. We made a sale of hops to him.

Q. That is the same sale that is referred to as being delivered subsequently to November 4th?

A. It was delivered after November 4th, I believe, it is down on that list. It is one of the Cosumnes lots that we believed we delivered to Hohenadel after November 4th. [220]

Q. It was shipped to him October 15th?

A. Yes, exactly. It was not shipped to him, it was shipped to ourselves.

Q. The sale was made to him?

A. Yes. With reference to the 497 bales, they had

(Testimony of F. G. Ernest Lange.)

been referred to in our testimony; they had been previously sold, but no delivery made until after November 4th. With reference to the 1503 bales all of them were sold after November 4th. No sale was arranged until it was made.

The COURT.—(Q.) Here is 30 bales that were shipped to the order of E. Clemens Horst Company, New York, notify John Hohenadel. Now, counsel, and not without reason, asked you why those 30 bales were noted here, "Notify John Hohenadel," and he asks you if that would indicate that the sale had been arranged prior to November 4th?

A. That is a part of the 497 bales that we sold previous to November 4th. It was not a part of the 1503 bales.

Q. Turn to the 474 shipped on October 29th, and see where they went to.

A. 15 bales was a part of a shipment of 20 bales. Shipped to the order of E. Clemens Horst Company, notify the Crantz Brewing Company, Finzley, Ohio. With reference to the 3062 bales on hand on November 4th, 1912, they were as follows: 1061 bales on the ranch; 169 bales on the ranch; 400 bales at Milwaukee; 448 at New York; 639 bales at Chicago; 345 bales en route east.

Q. How do you distinguish between 855 bales on the ranch, November 4th, 1912, showing the location of the 2000 bales of Cosumnes hops, from the other bales on the ranch, 1061 bales on the ranch, by the records in your book?

A. The 1061 bales includes the hops that were on

(Testimony of F. G. Ernest Lange.)

the ranch as shown on that sheet. There were no records on the books of any [221] such segregation.

Q. How are you able to say which of these 855 bales of the 2000 bales on the ranch in November, 1912, were Pabst goods?

The COURT.—He has not said anything about that. They had 3062 bales of Cosumnes air-dried hops on hand, November 4th, and they did not say they segregated any. They do not claim they segregated any, that is laid aside the 2000 bales for Pabst, and laid aside other bales for others, but that they sold to the account of that contract, in obedience to a requirement that they must, as expeditiously as possible, get what they can out of the goods. They sold 2000 bales.

Mr. POWERS.—I want to find out where the records are segregating these 855 bales as having been sold on account of Pabst Company from the 1061 bales that he says were on the ranch at that time.

The COURT.—There is no testimony of any such segregation.

Q. (To Witness.) How are you able to make up this paper headed, "The location of 2000 bales of Cosumnes hops, November 4th, 1912"?

A. Because we knew 1503 bales were sold after November 4th, of which 497 bales of hops on previous sales were delivered after November 4th on such previous sales. We knew the lot numbers of those, and we knew the lot numbers of the 3062 bales on hand November 4th, so it was a very simple matter,

(Testimony of F. G. Ernest Lange.)
having that information, to take out the 2000 bales, delivered after November 4th, on the account of Pabst.

Q. Of that 497 bales thus segregated, 20 of them had been already sold to this peculiar name, Hohenadel? A. Yes.

WITNESS.—This book contains the entry of the sales made in the United States after November 4th, 1912, including not only Cosumnes hops, but all the hops sold in Chicago, New York and the San Francisco office.

Mr. POWERS.—I offer page in evidence.

The entries were as follows: [222]

Date. 1912.	Name.	Bales.	Form.	Price.	Time of Shipment.	Lot.	Remarks.
Aug. 21–	J. Hohenadel	10	79	21	Oct.	518	
Aug. 31–	Kitanning Brg. Co.	5	—	20	Immdty	451	
Sept. 18–	P. Barman	1	—	23	At once	451	
Sep. 25–	Kanawha Brg. Co.	5	—	23	" "	451	
Oct. 4–	Worcester Brg. Co.	100	79	16	(Oct.)	507	—Oct. 3 strkn. out.
Aug. 23–	J. Hohenadel	20	79	20	(Feb./Mar.)	518	Oct. 11 strkn out.
Oct. 4–	Geo. Cooke Brg. Co.	10		19	at once	454	
Oct. 1–	Liebert & Obert	5	79	21½	" "	451	—Sept. 31 stkn. out.
Oct. 5–	Gottfried Brg. Co.	2	—	18	" "	454	
Oct. 11–	F. W. George & Co.	10	—	17½	" "	451	
Oct. 10–	Citizens Brg. Co.	5	—	20	" "	454	
Oct. 8–	Krantz Brg. Co.	15	79	15—15	Bl. Jan./Feb.	474	—Oct. 9 stkn. out.
Oct. 16–	Eastern Brg. Co.	20	—	18½	" Oct.	451	
Oct. 14–	Florida Brg. Co.	5	—	19½	" "	451	
Oct. 18–	Gambrinus Brg. Co.	5	—	18	" "	454	
Oct. 22–	Eagle Brg. Co.	100	79	17½	" Nov.	513	
Oct. 15–	Bellaire Brg. Co.	15	—	18	at once	454	
Oct. 11–	T. Zoltowski	5	—	18¼	" "	454	
Oct. 26–	Dayton Brg. Co.	300	79	17	" " 100B	466	.—99B467.—100B468.—(1B454
Oct. 29–	United Brg. Co.	100	Sale memo.	19	" "	516	—Former date stkn out.
Oct. 30–	Kewanee Brg. Co.	25	—	19	" "	454	
Nov. 1–	United States Brg.	196	Sale memo.	17	" " 100B 96B	508 510	—Oct. 31 strkn. out.
Oct. 20–	Dayton Brg. Co.	1	—	17	Delivd.	454	
Oct. 30–	F. W. George & Co.	1	—	19	"	451	
Oct. 26–	Frostburg Brg. Co.	2	—	23	"	451	
Oct. 26–	Park Brg. Co.	1	—	18¼	"	451	
Nov. 1–	F. W. George & Co.	1	—	18	at once	451	
Oct. 26–	Park Brg. Co.	1	—	17½	" "	512	
Oct. 21–	Isengart Brg. Co.	5	—	17½	" "	512	
	Sales of 1912 Crop Consumne Hops Made After Nov. 4, 1912.						
Nov. 7–	W. P. Downey	3		17	at once	512	
Nov. 12–	Steil Brewing Co.	50		14½	"	509	
Nov. 12–	Park Brg. Co.	5		17½	"	451	
Nov. 12–	Springfield Brg. Co.	98		14	"	506	—Price 15 strkn out.
Nov. 13–	F. W. George Co.	1		16	"	415	—Price incls. 1¢ to (Geo. & Co.
Nov. 13–	Narragansett Brg.	100		16	"	509	
Nov. 15–	S. F. Rothaker Brg.	25		16	"	512	
Nov. 12–	Gutsch Brg. Co.	3		17	"	454	
Nov. 12–	C. A. Pulkrabek	1		16¾	"	460	
Nov. 16–	J. & M. Haffen Brg	25		15	"	509	
Nov. 16–	Medina Brg. Co.	5		18	" 3Bls.	451	.2 Bls. 512.
Nov. 23–	Geo. Cooke Brg. Co.	10		17	"	460	
Nov. 7–	Florida Brg. Co.	10		17¼	"	451	
Nov. 20–	F. W. George Co.	10		16	"	512	
Nov. 15–	F. Sandkuhler	1		19	"	451	
Nov. 12–	Park Brg. Co.	15		15	"	451	
Nov. 19–	F. W. McGowan	5		16½	"	512	
Nov. 26–	Boston Beer Co.	50		16	"	515	
Nov. 20–	Eastern Brg. Co.	20		15	"	512	
Nov. 22–	J. Kuhlmann Brg. Co.	10		16½	await shipping instructions.	512	
Dec. 6–	A. Bruyndonckx	1		861	Jan., Feb., Mar.	512	
Dec. 11–	F. W. George Co.	25		15	"	465	
Dec. 9–	Lauer Brg. Co.	5		15	"	515	

Date.	Name.	Bales.	Form.	Price.	Time of Shipment.	Lot.	Remarks.
Dec. 13–	Centerville Brg. Co.	6		16½	"	460	
Dec. 17–	Consumers Brg. Co.	5		17	as ordered—	4 Bls.	454—1 Bl. 460.
Dec. 17–	Henderson Br. Co.	20		14	at once	460	
Dec. 18–	Medina Brg. Co.	15		17		512	
Dec. 12–	F. W. George Co.	2		14½	"	512	
Dec. 20–	Jos. Haefner	92		16			
Dec. 21–	S. S. Steiner	44		14½	"	515	
Dec. 19–	Jefferson B. & M. Co.	4		16	"	460	
Dec. 26–	Mobile Brg. Co.	20		16		461	
Dec. 31–	Silverton Brg. Co.	6		18	at once	460	
Dec. 28–	Centerville Brg. Co.	10		17	Mar. 15th	460	
Jan. 2–13	Frostburg Brg. Co.	3		18½	at once	473	
Jan.	Sutherland & Co.	50		17	"	462	
Feb. 5–	Geo. Cooke Brg. Co.	15		15½	"		
Feb. 7–	Manhattan Brg. Co.	52 or 60)	sale memo.				
				16	"	517	
Feb. 8–	Frostburg Brg. Co.	8		16½	"	524	
Feb. 23–	J. Camu & Fils	50		15	"	470	
Feb. 19–	Smith & Capron	25		14	" 15 bls.	518	.14 bls. 521
Feb. 28–	L. D. Jacks	65			3 bls.	525	.1 bl. 475.
					14 bls.	511	.12 bls. 474
					4 bls.	518	. 2 bls. 476
Jan. 6–	Cleveland Sandusky B. Co.	97		16½	91 bls.	523	. 6 bls. 524
Jan. 8–	Aurora Brg. Co.	85		16	Feb. 1913	461	
Jan. 13–	S. S. Steiner	33		16		519	
Jan. 11–	C. H. Atz	6		16	delved	473	
Jan. 15–	S. S. Steiner	91		15½		473	
Jan. 11–	F. Staemele	2		18	at once	460	
Jan. 22–	Werner	1		15	"	460	
Jan. 22–	Menasha Brg. Co.	1		16	"	460	
Jan. 28–	Smith & Capron	42		15	"	522	
Mar. 14–	Altoona Brg. Co.	15		17½	"	524	
Mar. 6–	Yale Brg. Co.	35		16	"	524	
Mar. 8–	Allegeir Brg. Co.	2		16½	"	470	
Mar. 11–	Johnson Brg. Co.	25		15½	Apr. 11	470	
Mar. 12–	Cataract Consumers	10		16	at once	470	
Mar. 3–	Hopkins & Co.	2		13	"	515	
Mar. 15–	Bauer-Schweitzer	5	81	14	"	476	
Mar. 10–	McHenry Brg. Co.	1		17	"	460	
Mar. 26–	Centerville Brg. Co.	6		16	" 5 bls.	460	1 bl. 590.
Apl. 4–	E. L. Husting	1		15	"	519	
Apl. 12–	A. Hupfels Sons	38		13½	"	470	
Apl. 26–	Vogl's Indep. Brg.	1		15½	"	519	
May 12–	Atlas Brg. Co.	3		14	" 2 bls.	519	1 bl. 460
May 27–	Atlantic City Brg.	10		14	"	526	
May 23–	E. H. Gamble	5		13	"	511	
Jun. 5–	Lykens Brg. Co.	8		13½	"	525	
Jun. 28–	Stroudsburg Brg.	5		14	"	525	
July 9–	Yale Brg. Co.	3		13	" 2 bls.	521	1 bl. 518.

[Testimony of C. C. Sweeney, for Defendant (Recalled).]

C. C. SWEENEY, recalled by defendant.

Direct Examination by Mr. POWERS.

With reference to samples 1 to 20 I would state their character and grade runs from medium to prime. The highest grade of those is below choice. A choice hop is one that is ripe, uniform in color, fully matured, cleanly picked, free from damage by mould and insects, good flavor, properly cured and baled. These hops do not come up to that standard in any particular. They are not bright nor uniform in color. They are not cleanly picked. They are dirty picked. They are not fully matured. That is the hop had not reached the stage of ripeness when it contains the full amount of lupulin. A hop that is picked early does not contain the full amount of lupulin. Referring to sample 13, the color is mottled and is not uniform. There are green berries, brown berries and yellow berries.

Q. What should the color be in a choice hop?

A. The color in a choice hop should be uniform, whether green or yellow, it is immaterial. This sample is not a well picked hop; it is a dirty picked hop. I would grade it as a medium sample. With reference to the other samples on the table. They are a little bit better grade. But none of the better grades run as high as choice. I first saw samples 21 to 24 when I received them from Wolf, Netter & Company, in Chicago, about September or October, 1912. They were bright hops. They would grade from prime to

(Testimony of C. C. Sweeney.)

choice. They are fully primed, but a couple of these samples were a little bit over prime. They had defects in them that would put them out of the choice class, and would not remove them from the prime class. When we say full prime, we are putting a limit on them. They are better goods than samples 1 to 20. The difference consists in brightness in color and uniform in color and the picking is cleaner. Sample #36 is too [225] small to get a good idea of the hop. It is not a commercial sample. It is no sample. When a line of samples is submitted to the buyer, he compares that line of samples submitted to him with the type samples that are left with him and compares them, and if everything is all right, it is up to the buyer to see that as far as quality is concerned, that the quality equals the type samples. If they do not he throws them off.

The COURT.—What is meant by the word "type"?

A. That is the sample we have got to match up in delivering to him.

Q. If one sample of 25 to 38 is sufficient, would that sample be taken as a delivery, or do two or three or what number on a quantity of hops, say two thousand bales?

A. It would not. It must be the majority of the samples. The samples must be equal to the type, otherwise the deal is off. I have seen choice hops of the character "Air-dried" Cosumnes, by the process carried on by Mr. Horst. They are commercially accepted as equal to choice kiln-dried hops of the same quality. They are commercially the same

(Testimony of C. C. Sweeney.)

and are taken the same. You cannot tell one from the other in their physical appearance in the bale and on the market. In November, 1912, I, myself, sold from 22,000 to 23,000 pounds, on which, in my opinion, I could have made a delivery of Cosumnes air-dried hops, if they were choice. This would be be about 1500 bales. Eleven bales make a pound. This would be 1200 or 1300 bales of Cosumnes, and I probably sold 1500 bales of other choice hops of the same character. In December, 1912, I sold more than 300 bales. That market at that time with reference to sale of choice hops to brewers was 22 to 24¢ and there was a demand. The demand for prime and common was not as good as choice. If the defendant had had 2000 bales of choice air-dried Cosumnes hops in November, 1912, he could have sold them for from 20¢ a pound up. It would take him about a week to do so. I, myself, would have [226] bought choice air-dried Cosumnes hops in Milwaukee in 1912, as cheap as I could. I pay in November 18¾ cents and 18 cents out here on the coast for choice Cosumnes hops. They were absolutely the same commercial value as air-dried Cosumnes hops. In Milwaukee the price to the grower would have been that price plus 1¾¢ freight from California, and to the brewer at that time 22½ to 24 cents.

Q. Did you actually sell the Pabst Brewing Company some hops, of a choice variety in November, 1912, for their brewing purposes?

The COURT.—This is absolutely immaterial here.

Mr. POWERS.—It goes to our cross-complaint.

(Testimony of C. C. Sweeney.)

We are compelled to buy hops to fill our requirements.

Mr. POWERS.—Save an exception.

Q. Are you familiar with the reputation of brewers throughout the United States with reference to their character and in the rejection of goods, and their reputation for rejecting goods? A. I am.

The COURT.—That is wholly immaterial to the issues here.

Mr. POWERS.—Mr. Horst has testified that the reason he prepared to commence his lawsuit was because the Pabst people had a reputation for rejecting goods. I want to prove by this witness that they never do reject any goods, and never have except Horst's and one other lot.

The COURT.—The evidence will be excluded, as wholly immaterial.

Mr. POWERS.—Exception.

Exception #81.

I have examined sample 27, one-half of which was sent to the Pabst people, and the other half which was retained by Horst, and I find them to be the same character as the other samples. The effect of the blue ribbon on the green gives it a yellow cast, caused by the reflection of the light from the blue, [227] and the fact of a ribbon being run through a sample (referring to sample) prevents it from being opened unless you slip it. It is not a commercial sample. Experts in examining samples are very careful of the light they examine them in. Light is one of the principal features. You cannot tell the color and

(Testimony of C. C. Sweeney.)

generally aim to have overhead light.

Cross-examination by Mr. DEVLIN.

I came from Milwaukee with Mr. Zaumeyer, at the request of Colonel Pabst, who is paying my expenses.

I have examined samples 20 to 24. They were Cosumnes hops.

I have been attempting to help Mr. Powers in the trial of this case any way I could. I have no personal interest in it whatever, except I gave those four samples and Mr. Powers asked me to help him. I am not connected with the Pabst Brewing Company at all. I am interested as a man in the business who is going to submit poor qualities of samples and get a good price on the delivery of a poor quality. I want to know it. I am against that kind of a man. I am a hop expert. There are quite a few other hop experts. There are ten or twelve in the business that are as good as I am in buying and selling hops, scattered around the country. This is the first time I have ever appeared in court, as an expert, except once in Eugene, Oregon, and the third time I have been in court. All experts know what a choice hop is. They have it in their mind's eye, and each time a sample is submitted to them they look at the sample.

Samples 21 to 24 are not choice hops, but are full prime. Prime to choice. I could not tell Horst's air-dried Cosumnes from other hops. I buy by sample. I bought more than one thousand bales of hops for the year 1912. Whether they were air-dried hops of the Horst style, or the other kind, I could not

(Testimony of C. C. Sweeney.)

tell, because I buy them by samples. I offered to sell several [228] thousand bales of hops that grew in the Cosumnes, but I could not tell whether they were air dried or the other way. I bought a part of the crop of Lannigan & Faust, a part of the crop of L. D. Jacks and some from Kennedy. My business is done through Wolf Netter & Company of San Francisco. They sell the hops to me. I know the general character of the hops. I can tell Cosumnes hops when I see them in the early season. I can tell it from a New York hop and from a Yakima hop. I am not familiar with American River hops nor Yolo hops. I know the general appearance of a Cosumnes hop. If hops were grown in another district and had the same characteristics as a Cosumnes hop I could not tell them from a Cosumnes hop. I bought Cosumnes for ten or twelve years, and sold them for ten or twelve years to the brewer. I have in my mind's eye what Cosumnes look like. The samples I received from Wolf Netter & Company of San Francisco, are marked as Cosumnes hops and that indicates to me the place or the region where they were grown and I have got them in my mind's eye. When I receive samples of them and I ascertain that there are so many bales of Cosumnes hops, I look at them and then I sell them for the highest price I can. I could tell them if the brand was not there. The hops that I bought from Wolf Netter were not choice hops. Samples 21 to 24 are the hops that I bought from them. I did not sell them as choice hops. I did not sell them to Pabst. I thought Mr. Pabst

(Testimony of C. C. Sweeney.)

was in the market to buy hops. He said he was and I gave him some samples of hops, and he could call them choice hops if he wanted to. Mr. Pabst asked me for choice hops. I gave him four samples of Cosumnes hops. I am in business for myself at Portland. I have one of the biggest offices in Portland. [229]

Redirect Examination by Mr. POWERS.

At the time I delivered these samples to Mr. Pabst he asked me for some samples of choice Cosumnes hops. He did not tell me that he was using these samples as a basis of buying hops from anyone else. When I sell a man hops and leave my samples, I make deliveries that stick. If we do not do that we get into trouble.

Q. Is any connection that you have with Mr. Pabst or with this case, such as would cause you to change your testimony in any way?

Mr. DEVLIN.—I object to that. That is a matter for the jury to determine.

The COURT.—The jury must determine that from the witness's testimony.

Mr. POWERS.—Exception.

Exception #82.

Recross-examination by Mr. DEVLIN.

I sold some hops to Mr. Pabst myself afterwards in 1912. They were Yakimas. They were no better than Cosumnes and do not sell for better price. I got 30¢ for some of those, 24¢ and 23¢ for others.

Q. What would hops like those on the table (re-

(Testimony of C. C. Sweeney.)

ferring to samples 1 to 20 and 25 to 38) sell for in November 1912?

Mr. POWERS.—I object to that as not cross-examination.

The COURT.—Objection overruled.

Mr. POWERS.—Exception.

Exception #83.

A. 18¢ in Milwaukee. About 16¢ here. The poorest of them would probably sell for 15 or 16¢ as a job lot, take them all through. You can sell a lot of that kind of hops at any time for 15½ or 16 cents. A job lot is all sorts of qualities, as these hops are, one to twenty. They run from medium to prime. If a choice [230] hop is twenty cents, a prime hop or a medium hop would be less. The four samples 21 to 24 were prime. I would not call them choice. I would call them prime. I call these other medium. You can call some of them good prime. None of them are as good as 21 to 24. Some of the hops 25 to 28 are better than 1 to 20. A little better. They are possibly prime hops. I saw choice hops in the Cosumnes crop in 1912 amongst the samples that Wolf Netter & Company sent me. I bought a lot of the 1912 hops. Some of them were prime to choice. Yes.

Redirect Examination by Mr. POWERS.

Q. If there were 2000 bales of choice Cosumnes hops on hand that had been rejected by one brewer, how would that affect the sale in the market?

A. If they were choice it would not bother the sale of them.

[Testimony of Otto E. Schultz, for Defendant.]

OTTO E. SCHULTZ, called, sworn testified as follows:

Direct Examination by Mr. POWERS.

I have been connected with the hop business for the last 33 years. Growing and inspecting hops, buying from the growers and selling to the brewers for fifteen years. At the present time I am traveling for the Calumet Malt Company of Chicago and come in contact with brewers and hops are shown me daily. For a number of years I was familiar with the quality of hops by actual sale, and consider myself a hop expert. In March, 1913, I was called by defendant to their hop house and requested to look at a lot of samples. Mr. Zaumeyer and myself went into the hop-house and he took out a lot of samples from a locker and asked me to examine them and give my opinion. The line of samples are those now shown me from 1 to 20, and then he handed me four samples from 21 to 24, and then fourteen samples, from 25 to 28. They were at that time in very good condition, as far [231] as preservation was concerned. I found the quality to be what is termed medium to prime. For the reason of their uneveness in color, immaturity and dirty pick they were not choice. They were not all the same. They run in various colors, unsightly to the eye and were of more or less dirty pick. They were very dull in appearance, a dull, brassy green. Dullness affects the color of the hop because of the unsightly color, and it is evident that the hop itself is immaturely picked. Picked too early.

(Testimony of Otto E. Schultz.)

I examined sample #36 and found it rather small, too small to base a judgment upon. Samples 25 to 28, with the exception of 36 were of the character of medium to prime. They are practically the same character of hop as 1 to 20. A few samples of 25 to 38 would class as prime. I also examined samples 21 to 24, and found them very uniform in color, full in berry, and well filled with lupulin. They were prime to choice. They were not choice for the reason of the uncleaniness in picking. But for the picking they would class as choice. They were practically the same character of hop as 1 to 20. Samples 21 to 24 were hops of a better quality than 25 to 38. Samples 25 to 38 would not be accepted in the trade as hops equal to 21 to 24. Hops cannot be cured in such a way as to prevent experts from seeing the leaves in them. Commercial samples when they are wrapped in a blue ribbon or blue paper, are taken out of the paper for examination in order to determine the color of the hop, because the blue paper reflects and casts a light upon the sample, and it is deceiving to the eye as to the proper color. We take it away from the influence of the paper. With reference to the present condition of samples 1 to 20, there has not been much change from their condition as to uniformity of color at the time when I first saw them. So far as the uniformity of the sample is concerned, the change has been regular. With refernce to the [232] other qualities of the samples, they do not differ at all. There is practically the same amount of lupulin, only that it is aged. The essential oils

(Testimony of Otto E. Schultz.)

have evaporated. So far as the picking is concerned the samples are in same condition to-day as they were when picked. The pick is identical. The berry is identical. The same answer applies to samples 25 to 38. They have been mussed by handling, but it does not interfere with an expert in looking at the sample. You split a sample or take a cut of it so you can more readily inspect the hop by going into each berry separately.

Cross-examination by Mr. DEVLIN.

I live in Milwaukee. Am a traveling man for the Calumet Malt Company, selling malt to brewers. They buy hops. That is the Gottfried Brewing Company, which is practically one and the same company buys hops. I came to California with Mr. Zaumeyer, and he will pay my expenses. I do not expect anything else because I am a friend of Colonel Pabst of the Pabst Brewing Company. During the days when I was in the hop business we did a great deal of business *with*. *I* was then buying and selling hops. This was 12 or 15 years ago. I have been assisting in the preparation of this case whenever requested to do so by Mr. Powers. When I examined the hops in March, 1913, Mr. Zaumeyer told me that he wished me to examine them at the request of Mr. Pabst. It was usual for me to be called by the defendant for the purpose of examining the hops at various times during the season when I happened to be there. This is the only time I was called in 1913. I was called in 1912 at various times. I do not remember any particular time but very frequently. I have never had

(Testimony of Otto E. Schultz.)

any hop law suit. This is the first time I have been in court. I also buy barley and sell malt. I cannot say how many hop experts in the United States. Everybody in the hop business is an expert. Every brewmaster in the United States considers. [233] himself an expert. There are probably four or five thousand.

[Testimony of Milton L. Wasserman, for Defendant.]

MILTON L. WASSERMAN, called and sworn testified as follows:

Direct Examination by Mr. POWERS.

I am in the general hop business. Have been for 25 years buying and selling hops. Consider myself a hop expert. Make my living in that way and am familiar with the usages of the trade. We handle on an average of fourteen or fifteen thousand bales annually, buying and selling to the brewer through our eastern connections. We have been familiar with the prices obtained for the last ten years in the hop trade. We have seen samples of the Horst air-dried hops. With reference to choice Cosumnes hops of that character and choice Cosumnes hops of the kiln-dried character, the physical character of the same, and the same figures would be obtained for them commercially. The price of Cosumnes hops, if choice, whether kiln dried or air dried, would be the same. I have examined samples 1 to 20 on this table and lotting the whole bunch together I would call them a good brewing hop. They would range be-

(Testimony of Milton L. Wasserman.)

tween medium and prime. That is, averaging them all together. There are some better than others. I would grade the poorest of the lot, medium. I would grade the rest good brewing hop, about prime.

Q. Why are they not choice?

A. The color is lacking. They are not uniform in color. The picking is the main contention on account of their quality not being choice. There are some leaves and stems. It is not good and it is not very bad. It is not a clean picked hop. In buying 2000 bales from a lot of twenty samples, in accordance with the usages and customs of the trade, I would judge that at least 80% of the samples would have to be choice and up to the standard in [234] order to be accepted. I examined samples 25 to 38 on this table. I found them immature and some of them were dirty pick. I would grade them at about medium to good brew. These samples are not quite as good on the whole as samples 1 to 20. The reason samples 25 to 38 are not choice, is that they are lacking in color and picking principally. The samples are rather small to go into much detail on them, but looking at those samples now, being aged, we cannot judge much about the aroma of them, but from the appearance of the samples, the main contention is their picking and color. I have also examined four samples 21 to 24. They are better than 1 to 20 or 25 *or* 38. I would grade them as prime. The color is not quite up to choice. If I could judge of the flavor of them, if they were too fresh samples, I might be able to stretch a point, but looking at the samples now, or,

(Testimony of Milton L. Wasserman.)
the appearance of the samples now, I would simply grade them as prime hops. The pick of them is very good. It is better than 25 to 38. I would consider them clean picked hops. If told that they had been in cold storage form November, 1912, with the exception of being taken out once or twice for investigation and then opened again in April, 1914, about three weeks ago, brought out from the east, left around the courtroom, we could not judge of uniformity of color so well, no matter if they have been kept in cold storage, when they are taken out of cold storage there is some slight difference. You can judge the color there but not as good as if they were fresh hops. So far as uniformity of color you could judge that. You could not judge the flavor at all. The reasonable value of choice Cosumnes hops in November, 1912, was 17 cents. I bought some. This would be the price to the grower. When that hop was sold to a brewer we would have to include the operating expense here, which is figured at about half a cent, and the freight 1¾ cents, and [235] the salesman's commission, say from four to six months time, to the brewer and interest on their money. They generally figure it that way. They always figure about three cents a pound expenses and operating between the grower's price and the selling price. A price of 17 cents to the grower would be a price of about twenty cents to the brewer, plus whatever profit they would ask. Probably they would generally figure one and a half or two cents. The reasonable value of the services of a broker for selling hops would be from a

(Testimony of Milton L. Wasserman.)

half a cent to one cent a pound. The highest I know is a cent. The agent or the broker pays his own expenses. I never knew of a brokerage allowance as high as one and a half or two cents. There was very little change in the price of choice goods. Say for six months afterwards. In fact 17 cents was paid in November, December and January for Wheatlands and Cosumnes hops, which at that time were pretty close together in quality. The condition of the market was at that time better. It remained stationary right through. For lower grades, for medium grades, which were greatly in the majority in California at that time due to climatic conditions at harvest time, especially Sonoma County, why inferior grades decreased. Prices went down.

Q. Suppose you had 2000 bales of choice hops in November, 1912, how long should it have taken the market to absorb them at 17 cents to the dealer?

A. You could dispose of them immediately. There was more than that sold in one day in the buying season. That is, during those months, say September October and November. I have known times when there have been as high as twenty-four or twenty-five hundred bales sold in this locality. It all depends upon the competition.

Q. What was the competition at that time? [236]

A. Well, if someone else would sell a little cheaper, one brewer might take an inferior grade of hops, paying less money for them. I do not think it would take very long, but I do not know what time it would require. I would say about a week or so.

(Testimony of Milton L. Wasserman.)

Cross-examination by Mr. DEVLIN.

I worked for Mr. Uhlman, who is engaged in buying and selling hops. I reside in Santa Rosa. I believe my firm is a competitor of Mr. Horst and has been for several years. The Pabst Brewing Company got me to be a witness in this case. I received a telephone message from Mr. Sweeney. I never met him and never knew him, but he telephoned me, I believe, from San Francisco over the long distance telephone and asked me if I would testify in regard to the Horst-Pabst suit. I asked him what interest he had in the matter and he said simply to see that justice is done between the brewer and the grower. I asked him how he was interested in the case and he said simply to purify the trade, or some remarks similar to that and that he wanted to see fair competition.

Mr. DEVLIN.—What did he mean by that?

Mr. POWERS.—I object to that as calling for the opinion of the witness on another man's mind.

The COURT.—It is cross-examination.

Mr. POWERS.—Exception.

Exception #83.

A. He was probably interested in the case on account of selling to these people; probably doing business in general for Pabst or other people, and naturally took an interest in it. I do not feel that I want to knock Horst. I am perfectly friendly with Mr. Horst. I have every reason to feel that way towards him. I never met Mr. Sweeney. I talked with him about two or three minutes. I

(Testimony of Milton L. Wasserman.)

never saw anyone until I entered the courtroom, except in consultation with Mr. Powers. I do not know that there is any **[237]** considerable opposition to Mr. Horst in the hop trade, except as in any other line of business. I grow a few hops, not very many. My principal business is buying hops from the growers and selling to the brewers at a profit. Middleman's profit. I do not think the middlemen have any feeling against Mr. Horst because he sells to brewers direct. There is a difference between the texture and the aroma, lupulin and general quality. In fact, there is so much difference that the brewers will pay twice as much for New York hops. There is a difference in the different varieties, or different sections of California hops. To the same extent as the difference between California hops and New York State hops, and Sonoma hops. Sonoma hops are the highest, then there would be Mendocino's next, then Sacramento Valley, according to the section. Sacramento hops rank among the lowest of those grown in California, but I have seen a good quality that would command the highest price for any section. Dealers will pay the same price for Cosumnes hops as for Russian Rivers, if they are choice. Grade for grade choice hops. There is always a difference of about one cent when the hops are not choice. I think between Sonomas and Mendocinos, the average grade, there would be two cents a pound difference, but choice hop, if it is really a choice hop will command a good price, no matter what section it is from.

(Testimony of Milton L. Wasserman.)

There are very few choice hops raised in the Sacramento Valley. The average quantity raised was approximately 40,000 bales in the last ten years. I do not think that over four or five bales were really choice. There are several growers in that section that annually produce choice hops. I do not understand that choice hops means the best average of the district, but it means that the hops have other qualities. If you should sell me 2,000 bales of hops as choice Cosumnes **[238]** hops and give me the best average Cosumnes hops in that section and they were not as good as I thought hops from that section ought to be in quality and lupulin, I would not accept them as choice. If I offer to make delivery, or deliver to a brewer choice hops from a certain section and those hops are not obtainable, I cannot give him the next best grade. I would have to give him hops that would be satisfactory to him from another section. From my understanding, if none of the hops raised in the Cosumnes district were choice as compared with the other choice generally, I would not accpt them as choice hops. The brewer or the man you sell to does not care how many hops are raised in the section, but all he cares about is what you agree to sell him. If I agree to sell a crop of Sonomas and the Sonomas were damaged by vermin, or there was a strike, and we could not deliver him that particular grade, we would have to make good on our delivery, under my contention. I have cured a few hops and superintend that part of the work, although I never fired, myself. I do all the dictation

(Testimony of Milton L. Wasserman.)

as to the growing and curing on the two ranches. I hire men to do the drying for me, and the coloring is produced by means of sulphuring, which brightens the color of the hop and preserves it. Sulphur merely permits it to hold the color as it comes from the field. If a hop was picked prematurely, sulphur would not make it a mature hop. If you took a reddish hop or an overripe hop, and sulphured it, it would not make it a greenish hop or a mature hop. That would not change an overripe hop or a green hop. It would not make a good hop bad or a bad hop good. They sulphur in Germany and Bohemia. Up to the first six months the Bohemian hops are the best, then they lost their bright color. Concerning picking there is no standard to judge picking by, as to how many hops there should be in a bale, except by inspecting the hops. If you **[239]** find stems or leaves in opening up a sample, or inspecting a sample, then you know the hops are not cleanly picked. Commercially, there are very few. Hops cannot be picked absolutely clean. The process of drying them in the kiln decreases them in stems and leaves when they are in the bale. It evaporates some of the leaves and shrinkens the stems. If you apply a lower degree of heat that would kill the leaves and the leaves would be perceptible. New York hops are not as clean picked as California hops. Still, New York hops sell for better prices than California hops. I did not buy or sell any air-dried Cosumnes hops in the year 1912. In January and February, 1912, a contract for hops before they were

in the bale was 25 cents a pound. In 1911, they ran as high as 40 cents a pound. They dropped until the 1913 crop came in and then they went up again. Before they knew what the crop of 1913 was going to be in February, the price was at the lowest point. There is some difference between the samples shown me here. Some are better in quality and some are cleaner picked. There are some good hops among them, but not choice hops. I have seen no choice hops in this courtroom. I have seen hops from the Cosumnes district in 1912, that would grade full prime. They were Mayon's and Chalmers'. I consider those the best in that section. I would only grade those as prime hops. The only choice hops in the 1912 hops of the Cosumnes district were the hops of Chalmers and Mayon. That is, they were full prime, next to choice. From a buyer's standpoint, there were no choice hops in the Cosumnes section. There is a difference in opinion among the brewers as to how we get rid of some of our inferior goods, but there is no standard to go by except individual judgment. I have never any trouble in regard to rejections. The difference in opinion grows out of the relative degree of experince and acumen of the different experts and buyers regarding hops. There could not [240] be a very material difference in the opinion regarding the quality of hops of the experts, if the hops of the 1912 crop were kept in cold storage and taken out once or twice to be examined, then boxed up and sent out by express to California, and left in the courtroom and exposed.

(Testimony of Milton L. Wasserman.)

A large proportion of the hops are sold shortly after the hops are picked. We sold some hops yesterday that came in from last year's crop. The ultimate consumer is the brewer and the rest of the dealers are the middlemen. Nearly every brewer has a surplus on hand. I have discussed the matter of selling hops in the latter part of the season with my people in New York, and they figure the cost between the buying end of it and the selling end of it and taking into consideration the various expenses, such as traveling and consulting with the brewers, insurance and storage at about 3 cents, and our buying expenses at this end ½¢ is included in that. There is a standard of brokerage between dealers and the market which is ½¢ a pound, and the 3 cents is the expense without profit. We add a profit to that which would be 1½¢. Sometimes where a competitor steps in we have to sell at cost in order to hold our trade, but 1½¢ is the average profit. I am not sure whether I could tell samples 21 to 24 from the other samples. There is some in this other lot there that I would call good prime hops. They are mingled with the other samples. I could pick out those four samples by placing them side by side among a lot of others.

Redirect Examination by Mr. POWERS.

The 3¢ expense that I talk about included freight, which is 1¾¢. The brokerage, insurance and interest would be 1¼¢ to cover buying and selling expenses, insurance etc. Stems and other extraneous matter make a dirty pick hop. There is no differ-

(Testimony of Milton L. Wasserman.)

ence between the market price of an air-dried Cosumnes hop cured by the process used by Mr. Horst and any other dried Cosumnes hop. [241] A man who knew the market price of a kiln-dried Cosumnes hop would also know the market price of an air-dried Cosumnes hop. Sulphur does not in any manner change the uniformity of color throughout the sample. Uniformity is the principal thing we consider in passing upon the quality of a hop. The uniformity in color of a hop would not be disturbed by cold storage so far as being variegated and uniform in color. It might dull the color, however.

[Testimony of John Mahon, for Defendant.]

JOHN MAHON, called, sworn, testified as follows:

Direct Examination by Mr. POWERS.

I am a hop grower and reside in Elk Grove in the Cosumnes district. I have examined sample 29, upon which my initials appear. That recalls to my mind that I saw it the latter part of 1912, or the fore part of 1913. It was shown to me by a Mr. Conrad and I do not remember the other gentleman's name. I examined it at that time to see whether or not it was choice. They told me the purpose of the examination at that time was that they wanted to work up a trade for Cosumnes hops with the brewers.

Cross-examination by Mr. DEVLIN.

I examined several samples. I signed a statement. The signature on the statement shown me is mine.

(Testimony of John Mahon.)

It reads as follows: "I, John Mahon, doing business at Cosumne, Hop Grower by occupation, do state.

1. I have had experience as hop grower with hops, for the past thirty-five (35) years at Cosumne, and that I am competent to judge the quality of Cosumnes River hops.

2. That I have personal knowledge of the personal crop of hops grown along the Cosumnes River in the year 1912.

3. That I have to-day examined sealed hop samples submitted to me by R. J. Nichols and marked X5, 6, 7, 8, 9, 10, 12, 14, 15, 17, 18, 21, [242] 22; 23; 25, 28, 29, 30, 31, 33, 34, 35, 36, 37, 38, and identified by my initials signed by me thereon, and

4. I say that each and all of said samples is in quality equal to or better than choice Cosumnes hops of the crop of 1912. Dated Elk Grove, Nov. 19th, 1912.

JOHN MAHON."

Q. Are those statements correct?

A. No, sir. I signed it because they said *that would* erase the word "choice," and under those conditions I signed it. I did not consider them choice.

I signed it because I supposed the word "choice" had been erased. They said they wanted me to sign the statement to work up a trade with the brewers for Cosumnes River hops. I did not consider the hops choice. I notice that the words "better than" are stricken out in front of the word "choice" before I

(Testimony of John Mahon.)

signed it with the understanding that the word "choice" was to be erased. I did not consider the hops choice according to my opinion. I thought average was the word they used if I remember right. I do not remember the name of the other man with Mr. Conrad. I had some choice hops in 1912 according to my judgment.

Sometimes a person will make a little mistake in drying a batch of hops and get a few that may not be choice. He may make a little mistake and get them a little too hot. Maybe you will have some heat in the bale before you get them choice. All my hops were taken as choice. I could not say about the other hops grown there, because I did not see them. I think my hops were as good as the neighbors. I think Mr. Chalmers' hops were as good as mine, and I think Mr. Hoover's were as good as mine. That was all the hops I saw grown in the Cosumnes River except those samples. By a choice hop I mean a hop that is well matured, well cured, good strength, color and so on. They have got to be reasonably well **[243]** picked. We try to get them as clean as possible. I put all my hops in together in the season of 1912. I did not take out a certain percentage as clean hops. I sold my hops to Nebius & Drescher. I was telephoned for this morning by young Mr. Drescher and he told me what they wanted me for. He told me to tell you what I knew about the hops. I had talked to him before about this. I had talked with several people about it. About two weeks ago. Mr. Drescher did not send for me. I saw him in

(Testimony of John Mahon.)

town. He did not say anything about this. I told him about these samples voluntarily. Mr. Drescher did not tell me he had any interest in this case. He knew I had examined these samples. My conversation with Mr. Drescher was very short. He did not tell me about the other growers signing statements and he wanted to see if he could not break them down. Mr. Nebius was there and nobody else. Afterwards I saw Mr. Powers at his office on Seventh Street. I went there myself. Mr. Drescher told me where it was. He told me Mr. Powers would want to see me. I went up there after lunch and there were several men in the office besides Mr. Powers. Mr. Sweeney was there and he talked to me a little. Mr. Koch was there and I do not know whether Mr. Butler was there or not. Mr. Koch and Mr. Schultz were there. I was not there more than five or ten minutes. Mr. Drescher has handled all my hops for the last twenty-five years. I do not consider myself under obligations to him.

Redirect Examination by Mr. POWERS.

If they had not told me that they were going to scratch out the word "choice," I would not have signed the statement. At the time I looked at several samples. I do not think any of the samples shown me were choice. Some were cleaner, than others, some were discolored and some were dirtier than others.

Mr. POWERS.—I introduce this paper in evidence. [244]

[Testimony of Otto E. Schultz, for Defendant (Recalled—Cross-examination).]

OTTO E. SCHULTZ (Recalled.)

Cross-examination by Mr. DEVLIN.

I have not been directly engaged in the hop business for the last ten or twelve years. Our concern used four or five hundred bales of hops. I have nothing to do with the buying of hops. I am a malt man. Mr. Godfried buys the hops for the brewery, but I am in daily contact with the hop business. I do not buy hops for the breweries or anybody else. I know the various sections in California, but I have never been in California before. I could not distinguish the different hops in California, but you show me the samples, and I can tell you the quality of the hops. A choice hop is a choice hop no matter where it is raised in any part of the world. A choice Cosumnes hop is as good as a choice New York hop, but it does not sell in the market for as much as a choice Bohemia hop. For the last five years the New York hop, grade for grade, bring about twice as much as the California hop. I have seen choice California hops in the various brewery offices. Some choice Sacramento County hops. A very small proportion of California hops are choice. A choice hop has not got to be a perfect hop. The Faazer hop in Bohemia is the nearest thing to a perfect hop. The reason that hops are not perfect is because they have more or less leaves bound with them, or they may be immaturely picked. Choice hop is a fixed term. The opinion of the expert decided it. There is no

(Testimony of Otto Schultz.)

Board of Trade or Chamber of Commerce that will fix the grade of hops like they do grain. It is a matter of opinion of the men who pass upon them. Where the purchaser and seller disagree as to the quality of hops, the seller must know what the term means when he sends in his samples as to the quality of his hops, and the purchaser will see that the hops delivered are the quality agreed on. They inspect the hops bale by bale with the tryer and he will call the **[245]** seller's attention to any defects and they settle the difference.

I would not expect to find 2,000 bales all uniform in color. They might vary in color and still be choice. They might have more or less leaves in them and still be choice, but there is no percentage that would determine it, except by inspection. New York hops are less cleanly picked than California hops on the average, but they sell at a higher price. Sometimes I can tell the difference between a California hop and an Oregon hop, but not always. The same thing applies to hops raised on the Pacific Coast and in the east. I do not think I could tell the difference between Cosumnes hops and American River hops. If you forward me a Russian River hops and they were like samples of the Cosumnes hops, I could not tell them apart. I do not think I could tell an Oregon hop, but I could tell a Bohemian hop. I could tell a European hop very easily. The Bohemian hop has a smaller berry, a more uniform berry, and is cleaner picked than the American. The blue ribbon on a hop deceives your eye. It im-

(Testimony of Otto Schultz.)

proves the color of the hop. You cannot examine it much by artificial light. Samples 21 to 24 are prime hops. I have not seen any choice hops in the courtroom. I cannot recall just when I last saw a choice California hop. I saw them at a good many brewers' offices, but I could not tell you when. I saw some choice California hops in the growth of 1912 in the Pabst Brewing Company's offices, or hop-house. I do not know where they came from. If you had a contract to sell me a quantity of the best raised hops in that district, still if they were not up to my idea of what choice hops were, I would reject them, no matter if they were the best hops raised in that district. The difference between air-dried hops and kiln-dried hops is not commercially known. I am familiar with the air drying process as distinguished from the kiln drying. **[246]**

[Testimony of Otto J. Koch, for Defendant.]

OTTO J. KOCH, called, sworn, testified as follows:

Direct Examination by Mr. POWERS.

I am a hop grower and buyer and have been in the business of growing hops since 1903, and in buying and selling hops since 1907. I make my living by selling hops and consider myself a hop expert. I deal in seven or eight thousand bales of hops a year. I have examined the hops here, 1 to 20, and consider them medium to prime. They are not cleanly picked or even in color. The worst samples are medium and the best samples are prime. I have also examined samples 25 to 38. They grade medium to prime. I

(Testimony of Otto J. Koch.)

have examined the four samples, 21 to 24. I consider them prime. Samples 25 to 38 do not compare in quality with 21 to 24. They are not so good. 21 to 24 are more cleanly picked and are more even in color. I was familiar with the hop market in 1912. The market for Cosumnes at that time was 17 or 17½ cents for choice hops. I attempted to buy them at that time. I wanted to buy a thousand bales if I could get them, choice air-dried Cosumnes of the character cured by Mr. Horst. At that time I would have bought them at that figure. This price 17 to 17½ cents was the price to the grower. I turn them over to George Proctor, who is a dealer. The commission for a broker in this market is one-half a cent. I do not know what the commission is for a broker selling from a dealer to a brewer. The market for choice Cosumnes hops in 1912, was strong.

Cross-examination by Mr. DEVLIN.

I have handled hops for Nebius & Drescher for the last couple of years. I have never worked for them. I sell for Mr. Drescher. I sold for him in the year 1912, a portion of the year. I shipped some hops for him this year. Mr. Schulz asked me to be a witness in this case. I never knew him [247] before he came to California. Mr. Drescher introduced me to him. I do believe Mr. Zaumeyer was there also. Mr. Schulz asked me if I shipped to Pabst Brewing Company and I said that I did. Also inspected goods. Mr. Schulz asked me if I would be a witness and that is all there was to it. He did not tell me what the controversy was about. This law

(Testimony of Otto J. Kach.)

suit has been common property all around. I knew about it. I heard about it more than a month or so ago. Two or three days ago I told what my opinion was of these hops. I know that Mr. Drescher does business for the Pabst Company here. A choice hop is a clean picked hop, a hop properly dried and medium color. There are three or four thousand bales of choice hops raised in California out of say 45,000. The percentage of hops in the Cosumnes section that are choice, are probably 1,500 or 2,000 bales out of eight or ten thousand that are raised there. Hops are all the same on the vines before they are picked. There is no difference between Russian River hops and Sacramento hops. I have done business only in Sacramento County. I do not know the difference between Yakimas and Sacramento hops. I handle Yolos, Cosumnes, and American River hops. If they are properly cured, and handled and cleanly picked I could not tell the difference. I saw the Cosumnes hops of Grimshaw, Pond, Peterson, Dietzel, Murphy, Mayon and Chalmers. Grimshaw's hops were not choice to my knowledge, nor were Peterson's. I considered three that were prime to choice. I would not say they were particularly choice.

Q. According to your idea, there were no choice hops at all in the Cosumnes district in 1912?

A. No, sir. I could not say that I have seen any choice Cosumnes hops out there. I have been familiar with the Cosumnes section since 1907. [248]

Q. According to your idea then, if a man would sell choice hops of the Cosumnes section for any year,

(Testimony of Otto J. Koch.)

it would be impossible for anybody to deliver choice hops since 1907?

A. I think so. I have seen American River hops prime to choice. A little better than prime, but not exactly choice.

Q. (By Juror.) Regarding the 1500 bales of hops that were delivered after November 4th, was the price agreed upon before that time or after?

The COURT.—The testimony is that the 1503 bales were sold without fixing the price after November 4th. The 497 bales of hops were disposed of according to the testimony of the witnesses under prior contract.

[Testimony of C. C. Sweeney, for Defendant (Recalled).]

C. C. SWEENEY, recalled by defendant.

Direct Examination by Mr. POWERS.

Witness is shown samples 21 to 24. I got these samples from Wolf Netter & Co., and turned the samples over to the Pabst people and when I turned them over to them they are the same as when they came from Wolf Netter & Co. After I first got them I kept them in the Kaiserholl Hotel in Chicago. We have a place down there in the hotel to keep our samples. I gave them to Colonel Pabst sometime in October. He asked me about the hops and I gave him those as four samples of choice Cosumnes hops. He did not tell me that he wanted to send the samples out to Mr. Horst. Colonel Pabst asked me if I had some good Cosumnes hops and I told him, yes, and I delivered him these samples. At that time it was

(Testimony of C. C. Sweeney.)

reported in the trade that he had a contract with Horst, but I did not know that he had a contract with the plaintiff for Cosumnes hops.

Cross-examination by Mr. DEVLIN.

Q. Are your sure that these are all Cosumnes hops? A. Yes. [249]

Q. I will ask you to look at the mark there. What is the name of the grower they came from? It came from Cosumnes grower. That is a private trade-mark of mine. Vernon is the name I gave it. It is not a grower's name at all. I think it is the property of L. D. Jacks' crop. I gave those four samples to Pabst as choice Cosumnes hops. It was up to him to look at them. If he came back to me and wanted to buy some hops from me, then he would buy so many bales of sample 191, and so many bales of Vernons.

[Testimony of C. S. Chalmers, for Defendant.]

C. S. CHALMERS, called, sworn, testified as follows:

Direct Examination by Mr. POWERS.

I have been in the hop business in the Cosumnes district for a little over thirty years. I know the Horst place. I visited the Horst ranch during the picking season of the year 1912 with Mr. Traganza, along about the last of August or the first part of September.

Q. What did you observe about the picking machine? Just explain what you saw.

A. Do you mean for me to tell you just what I saw?

Q. Yes. A. Well, I will tell you.

(Testimony of C. S. Chalmers.)

The COURT.—What is the purpose of this?

Mr. POWERS.—To show that the leaves and stems were being put in to these hops by instructions of Mr. Horst to put them in there.

The COURT.—That has nothing to do with this case at all. It would depend upon the condition of the hops shown here.

Mr. POWERS.—I would like to make my offer so that your Honor will understand. I offer to prove by this witness that he was present while these very hops were being baled; that he saw the leaves and stems being put into the dryer, subsequently these hops were baled as they are here; that he actually saw those things with his own eyes. [250]

The COURT.—The evidence is excluded as wholly immaterial to the issues.

Mr. POWERS.—Exception.

Exception #84.

The COURT.—Now, Mr. Powers, if this witness will testify that he knows that they were the hops that are now in controversy here, the identical hops, I will let him testify. You have got to prove that they are the identical hops, otherwise it is wholly immaterial.

Mr. POWERS.—We will connect it with the testimony of Mr. Horst, himself. Mr. Horst has testified that all of the hops were baled in one lot.

Mr. POWERS.—(Q.) At this time, while you were there, were the hops of the season of 1912 being baled?

A. Yes. They were running them from the kiln

(Testimony of C. S. Chalmers.)

over to the cooler before they were baled.

Q. That was all going on simultaneously?

Q. What operations were going on at the hop-house at the Horst ranch while you were there?

A. They were picking, drying and baling to.

Q. Explain to the jury what the processes were on the ground, from the green hops to the picker, and so forth.

A. There is no man under the sun who could swear that they were the same hop, only the man that shipped the hops.

Mr. POWERS.—Q. These were hops on the Cosumnes ranch of Mr. Horst?

The COURT.—State what you saw at Mr. Horst's ranch while they were baling Cosumnes hops.

A. That is picking and all. I went up there just to see the picking machine. It was my first experience with a picking machine. I have picked by hand all my life. [251]

The COURT.—Leave out all of that. Tell us what you saw.

A. I went there to see the picking machine run and it was running. The man who had charge of the picking machine was at the picking end of it and I asked him if I could look through it, and he said "I will show you." We went to the back end where the elevator was taking the leaves into the kiln. They had canvas along there to keep the leaves from going out. The stems and leaves were going into this elevator, and I said to the man, "Don't you pick out none of the leaves."

(Testimony of C. S. Chalmers.)

Mr. POWERS.—(Q.) What did you do about an examination of the kiln?

A. I went up to the kiln, and the hops were powdered up in the kiln where they were drying. They went into the cooler room and there was a man there baling them. They were going into a bale, then they were putting them out on the plains in the boiling hot sun with no cover over them whatever.

Q. What was said to you by the man in charge with reference to the manner of baling the hops, so far as the leaves and twigs were concerned?

Mr. DEVLIN.—I object to that as irrelevant, immaterial and incompetent and hearsay.

The COURT.—The objection is sustained.

Mr. POWERS.—Exception.

Exception #85.

Q. What was the condition of the hops in the Cosumnes district with reference to ripeness on or about August 12th, 1912?

A. They were green, too green to pick. They ripened from about the 20th to the 25th of August. There were no hops ready to pick before that.

Q. While you were at the Horst hop house, and seeing the picker at work in the manner in which you state, did the man in charge say anything to you about the manner in which he was picking hops so far as leaves and stems were concerned? [252]

Mr. DEVLIN.—I object to it as irrelevant, incompetent and immaterial.

The COURT.—Objection sustained.

(Testimony of C. S. Chalmers.)

Mr. POWERS.—Exception.

Exception #86.

Q. Was anything said by the man in charge of the picking machine and the hop house, concerning instructions, because of certain goods that were to be used to fill an eastern order?

Mr. DEVLIN.—I object to this as simply repetition of the same line of testimony.

The COURT.—Objection sustained. The only question before this jury is whether or not the hops tendered to this defendant were of the class called for by the contract. If they were, they were bound to take them notwithstanding their objections to them at that time. If they were not, they were not bound to take them. It is wholly immaterial as to what was done on the ranch, so long as the question refers solely as to whether these hops were of the class called for by that contract. That is all we are going to inquire into here. If the hops were of the character called for by the contract, the defendant was bound to receive them. If not, the defendant was justified in refusing them.

Mr. POWERS.—Mr. Horst on his direct examination, testified that there were certain clean-ups, and that these clean-ups were baled separately. Now, on my case, I am attempting to show that the clean hops were not baled separately, and the man in charge told this witness why they were not baled separately.

The COURT.—It does not make a particle of difference whether those clean hops were baled separately, or put in the general quantity for baling.

(Testimony of C. S. Chalmers.)

The only thing this jury has to pass on is whether the hops thus produced were of the grade and character called for by the contract.

Mr. POWERS.—We think it is in rebuttal of Mr. Horst's testimony. [253]. I will save my exception

WITNESS.—(Continues.) I examined certain samples of hops that were shown to me by Mr. Conrad from Mr. Horst's ranch, in the latter part of the year 1912. There was another man with him. I have forgotten the other man's name. I put my initials on the back of the cardboard, on some of them. I am familiar with the process of curing and handling hops and the character of hops. The character of the samples of hops that were shown to me by Mr. Conrade were not first class hops because they had a lot of leaves in them and a lot of stems in them. This man came down there and showed me some samples and said we were not getting what we ought to get for our choice Cosumnes hops. They said, "We have some samples here for you to look at, that we are going to get a better price for. We have a man in the east who is looking out for them, and we are going to get a better price for Cosumnes hops." They wanted me to look at them. I looked at them and told them I would sign the statement, but not as choice hops. They were green samples. The samples they showed me were green. They had leaves in them and stems.

Cross-examination by Mr. DEVLIN.

I was asked to testify in this case by Mr. Butler, this morning. Last Saturday when I was coming

(Testimony of C. S. Chalmers.)

to Sacramento I met Mr. Spicer and Mr. Schulz on the road. Mr. Spicer said "I want to introduce you to Mr. Schulz." I have known Mr. Spicer for a good many years. We stopped and shook hands and Mr. Schulz said, "When can I see you in Sacramento?" That was last Saturday about fourteen miles from Sacramento. They were in an automobile with Mr. Spicer's wife, and another gentleman I do not know. This morning was the first time I was asked to testify. They asked me if I knew anything about these samples. Mr. Butler at his office. Mr. Butler and Mr. Schulz were there. I sell [254] my hops to anybody that comes along. I have a contract with Mr. Drescher. I have been selling hops to him for twenty or twenty-five years. I have at times received advances from him. There ain't a hop man but what does. I have a few of my hops contracted for in advance with Mr. Drescher. The paper shows my signature (referring to statement presented by Mr. Devlin). They told me they were trying to get a better price for the Cosumnes River hops and I surely told them the truth. I told them I would not sign them as choice hops. I did not know whether they were telling the truth or not. I never read the paper, I was hard at work putting up my hops. I thought they were honest men, which I found out afterwards they were not. They showed me these samples and got me into court here and I did not know anything about it. If I had, I would not have signed it. I never knew there was anything wrong one way or the other with the paper when I signed it.

(Testimony of C. S. Chalmers.)

I never read it through.

Q. When you signed that, did you tell the truth?

A. As I stated before, when I signed it I said that the samples were not choice hops. I never put that in the paper. I say was out in the field working when the gentlemen drove up the hop house. I do not live down at the hop-house. I live about 2 miles away. When those men came here, I was working hard. I did not pay much atttenion to them. If I had had time I would have read the paper over to see what it was. As I said before I was doing it just to help them out. They said they were going to get a better price for Cosumnes River hops and I signed that, but not as choice hops. I would not have signed anything in the world like that if I had stopped to read the paper over. I was hard at work in the field. I am nearly fifty years old. I know one of these gentlemen here, Mr. Conrad. I know I signed some papers.

Mr. DEVLIN.—I introduce this paper in evidence as a part of my cross-examination. It reads as follows: [255]

I, C. C. Chalmers, doing business at Cosumne, hop-grower by occupation, do state.

1. I have had experience as hop grower with hops for the past thirty (30) years at Cosumne, and that I am competent to judge the quality of Cosumnes River hops.

2. That I have personal knowledge of the personal crop of hops grown along the Cosumnes River in the year 1912.

(Testimony of C. S. Chalmers.)

3. That I have today examined sealed hop samples submitted to me by R. J. Nichols and marked X5, 6, 7, 8, 9, 10, 12, 14, 15, 17, 18, 21, 22, 23, 25, 28, 29, 30, 31, 33, 34, 35, 36, 37, 38, and identified by my initials signed by me thereon, and

4. I say that each and all of said samples is in quality equal to or better than choice Cosumnes hops of the crop of 1912. Dated at Cosumne, Nov. 19, 1912.

C. S. CHALMERS."

There were no choice samples that I saw. They were all about the same. Some of them were a little cleaner and some were brighter in color, but none of them were choice.

Redirect Examination by Mr. POWERS.

Mr. Chalmers, as I understand it, when these gentlemen came to you and asked you to sign this paper—

The COURT.—Just a moment, do not repeat what the witness has said. Ask him anything you want to.

Mr. POWERS.—(Q.) What did you say to them about signing the paper with reference to the quality of the hops?

A. Well, I told them I would not sign as choice hops.

Q. At that time, you say you were employed taking care of your crops?

Mr. DEVLIN.—I object to that.

The COURT.—That has all been gone over.

Mr. POWERS.—Exception.

Exception #87. [256]

[Testimony of Edward Traganza, for Defendant.]

EDWARD TRAGANZA, called and sworn, testified as follows:

Direct Examination by Mr. POWERS.

I am a farmer by occupation. I know Mr. Chalmers who has just left the witness-stand. In the latter part of August I went to the hop yards of Mr. Horst with Mr. Chalmers. We saw the hop dryer in operation. We stayed there probably two hours or something like that.

Mr. DEVLIN.—I object to this testimony as evidently in line with the previous testimony of Mr. Chalmers. I object to it as irrelevant, incompetent and immaterial.

The COURT.—Is it to the same purpose?

Mr. POWERS.—Yes.

The COURT.—Objection sustained.

Mr. POWERS.—Exception.

Exception #88.

Mr. POWERS.—So I may make the record clear.

The COURT.—You say it is the same as Mr. Chalmers' testimony. You have your exception to that.

Mr. POWERS.—All right.

Mr. POWERS.—(Q.) Did the man in charge of the picker state what his instructions were with reference to the manner of handling the leaves and twigs?

Mr. DEVLIN.—I object to that as irrelevant, incompetent and immaterial.

The COURT.—Same ruling.

(Testimony of Edward Traganza.)

Mr. POWERS.—Exception.

Exception #89.

Mr. POWERS.—Mr. Butler has just called my attention to some of the testimony that has been given that may modify your Honor's ruling. Mr. Horst has testified that all of the bales were uniform in character and that one was the same as the other; and that there was no difference in the manner in which they [257] were baled. That none of the 2000 bales sold for Pabst was segregated. They were taken in a general lot.

The COURT.—I remember the testimony perfectly that has gone in here. It absolutely has no sort of bearing upon the question that the jury is called upon to decide, how those hops were baled, or what the condition in regard to the picking was.

Mr. POWERS.—We offer to show that the plaintiff willfully made the hops so unclean that it would be impossible for the samples to be in proper condition; that he wilfully included stems and leaves, and said he was doing so because he had to make weight on account of the fact that he had a contract in the east. The testimony is that there was only one contract.

The COURT.—If you can show anything of that kind, I will let you show it.

[Testimony of C. S. Chalmers, for Defendant.]

C. S. CHALMERS, recalled by defendant.

Direct Examination by Mr. POWERS.

The COURT.—If you can show that the plaintiff stated, that, not some man on the ranch, but if you

(Testimony of C. S. Chalmers.)

can show that the plaintiff has made a statement of that kind, I will let you show it.

Mr. DEVLIN.—I would like to ask if Mr. Powers in good faith intends to prove that Mr. Horst said that, and not some man on the ranch.

Mr. POWERS.—Not Mr. Horst personally, but a man in charge of the work for Mr. Horst at that time.

Mr. DEVLIN.—That has been ruled on before.

Mr. POWERS.—I want to show by the man who was in charge of the property at that time, your Honor. This man was in charge there and represented Mr. Horst at that time.

Mr. DEVLIN—Your Honor has ruled that he may show that Mr. Horst made a statement of that character. He cannot show that somebody else made that statement. [258]

The COURT.—The plaintiff is a corporation. Of course, Mr. Horst may be the principal owner, but one employed by a corporation can bind the corporation by his statements, if he is shown to occupy the proper relation. I cannot tell.

Mr. POWERS.—(Q.) Will you tell me who you saw at the hop house at the time you were there in August, 1912?

A. I cannot tell you the man's name.

Q. What was he doing?

A. He had charge of the picking machine.

Q. How many men did he have under him?

Mr. DEVLIN.—I object to that on the ground that he does not know that of his own knowledge.

The COURT.—(Q.) Do you know anything about

(Testimony of C. S. Chalmers.)

who the man was?

A. I do not, only that he had charge of the picking machine. He told me he had. He took me about the house and showed me various places and gave orders to the men about the place. I guess the men obeyed him. They seemed to do the work as he told them. He told them how to take the hop vines down and put them in the picking machine. He had nothing to do with the bales that were outside, but with reference to the drying process he had nothing to do with that. He had charge of the picking machine.

Q. What, if anything, was said by the man in charge of the picking machine concerning instructions with reference to the hops that were going into the picking machine?

Mr. DEVLIN.—I object to that on the ground that it is irrelevant, incompetent and immaterial and hearsay.

The COURT.—Objection sustained.

Mr. POWERS.—Exception.

Exception #90.

Mr. DEVLIN.—What ranch were you on at that time?

A. The Murphy ranch.

Mr. DEVLIN.—I would like to have Mr. Chalmers brought back here for cross-examination. Yesterday he testified as to a certain [259] conversation, or certain acts being done. We have assembled all of the men that were on the Murphy ranch. They are all in the courtroom here. I want Mr. Chalmers to point out the gentleman he claims he had any

(Testimony of C. S. Chalmers.)

conversation with. I withdraw our objections that we made to that testimony. I will give them the full chance. I would like to have Mr. Chalmers brought back here for further cross-examination.

Mr. POWERS.—I have no objection to it at all. I have no more control over Mr. Chalmers than you have.

The COURT.—I suppose he went away thinking that you were through with him.

Mr. BUTLER.—I think I can get him.

Mr. POWERS.—Do you want Mr. Traganza also?

Mr. DEVLIN.—Yes.

Thereupon the deposition of GUSTAV PABST was read.

[Deposition of Gustav Pabst, for Defendant.]

Witness sworn.

Direct Examination by Mr. SPOONER.

I am and have been since 1904, president of the Pabst Brewing Company, and familiar with the complaint and answer in the case, in every important detail. Mr. Zaumeyer and myself conducted the negotiations involved the 2000 bales of choice hops referred to in this action. Mr. Zaymeyer is a grain and hop buyer for my concern and as such passed upon the acceptability of hops which were offered for purchase. I remember in a general sort of a way the receipt of the night letter dated San Francisco August 21, 1911, referred to in Page one hereof, from E. Clemens Horst Company, and also the telegram to E. Clemens Horst Company dated August 25th, 1911, referred to in Page 2 hereof, and night letter dated August 25th,

(Deposition of Gustav Pabst.)

1911, addressed to Pabst Brewing Company, referred to at Page 2a hereof, and a day letter addressed to plaintiff August 26th, 1911, referred to at Page 2a hereof. I am familiar with the letter of August 24th, from E. Clemens Horst Company to Pabst Brewing Company, as follows: [260]

E. CLEMENS HORST COMPANY.
FIRST NATIONAL BANK BUILDING.
CHICAGO.

August 24th, 1911.

Pabst Brewing Company,
Milwaukee, Wis.

Gentlemen:—

In reply to your inquiry, we make firm offer of 500 bales 1911 crop "air-dried" Cosumnes at 40 cents, delivered in Milwaukee. Shipment between August and December, 1911, at your option.

This offer is made subject to sufficient extension in time for shipments and *or* deliveries to cover any and all delays arising from extraordinary conditions beyond seller's control.

Terms net cash upon receipt of hops.

Yours truly,
E. CLEMENS HORST COMPANY,
By G. S. C.

GSG–M.

—and recall the receipt of this letter. It refers to 500 bales of the 1911 crop at 40 cents. That transaction was consummated by the delivery of said five hundred bales and the use thereof by the Pabst Brewing Company. The shipment of the 1911 crop was between August and December, 1911. I remember

(Deposition of Gustav Pabst.)

the telegram from plaintiff dated August 29th, 1911, referred to at Page 2a and 2b hereof, and also one from defendant, dated August 28th, 1911, referred to at Page 2b hereof. Also night letter dated August 27th, from plaintiff, referred to at Page 2b hereof, and telegram dated August 28th, from Pabst Brewing Company, referred to at Page *referred to at Page* 2c hereof. Also letter dated September 4th, 1911, from plaintiff to defendant. I remember its receipt. The letter reads as follows:

Sept. 4th, 1911.

In reply refer to H–39811.

Pabst Brewing Co.,

Milwaukee, Wis.

Gentlemen:—

Enclosed herewith we hand you contracts in triplicate for the two lots of 1000 bales Choice Pacific Coast 1912 crop Air Dried Cosumnes Hops, as per telegraphic sales made you on August 26th, and August 29th respectively. [261]

Please be good enough to sign all three contracts of each set and return two of each set to us.

If you do not wish the sharing clause (clause 18) of the contract, please strike it out, and in that case the elimination of that clause will be satisfactory to us.

We appreciate your orders and confidently expect that the contract will result in a considerable profit to your good selves.

At this time, we beg to suggest again the advisability of your contracting a further quantity of 1912

(Deposition of Gustav Pabst.)

crop and especially as to your contracting for a term of year*d* beginning with 1913 and on such a contract we will make you a specially low price.

Faithfully yours,

E. CLEMENS HORST CO.

ECH/J. E. C. Horst.

Encls.

P. S. Also enclose contract in triplicate covering 500 bales 1911 crop Choice Brewing Pacific Coast Air Dried Cosumne Hops, as per sale of August 23d.

The enclosed drafts read as follows:

HOP CONTRACT.

[Written across face: "Duplicate."]

(1) Parties: Memorandum of agreement made by and between E. Clemens Horst Co. (a coropration), Hop Growers, hereinafter referred to as the "Seller" and Pabst Brewing Co., of the City of Milwaukee, Wis., hereinafter referred to as the "Buyer."

(2) Quantity: The Seller agrees to sell to the Buyer One Thousand (1000) Bales Hops about equal to or better than Choice Brewing Pacific Coast Air Dried Cosumnes Hops of each of the crops of the years 1912.

(3) Place of Delivery: Said Hops to be delivered on or at cars or ex dock or store Milwaukee, Wis., or at the Delivering Lines' Terminals convenient thereto.

(4) Price: Buyer agrees to pay on each bale of hops at the rate of Twenty (20) cents per lb. (Tare 5 lbs.) Plus Freight from Pacific Coast. Terms Net

(Deposition of Gustav Pabst.)

Cash or Sight Draft against Bill of Lading.

(5) Time of Shipment etc.: Time of shipment and/or delivery during the months inclusive of September to December following the [262] harvest of each year's crop, with such extra time as provided in paragraphs 12 and 16 endorsed hereon.

(6) Separate Bales: It is agreed that this Contract is severable as to each Bale.

(7) Default.

The Seller may treat entire *unfilfulled* portion of this contract as violated by the Buyer upon or at any time after Buyer's refusal to pay for any hops, or any note or acceptance given in payment for Hops that have been delivered and accepted hereunder, or if this contract or any part of it is otherwise violated by the Buyer.

(8) Conditions. This Agreement is subject to the printed conditions endorsed hereon.

Dated: Dated at San Francisco, Aug. 29th, 1911.

_____,

_____,

For the Buyer.

[Seal] E. CLEMENS HORST Co.

Per E. C. HORST.

Pres.

For the Seller.

ENDORSEMENTS:

(9) Freight, etc.

If any delivery hereunder is subject to freight, storage, duty, and/or any other charges for which under the terms of this Agreemnt Seller may be lia-

(Deposition of Gustav Pabst.)

ble, Buyer shall pay such charges and charge same to Seller.

(10) Discount.

Upon or at any time after delivery of any hops hereunder, Seller shall be entitled to net cash payment for the same by allowing to the Buyer interest on the unpaid portion of the account (if the hops are sold on time) at the rate of 6% per annum for any unexpired term of credit. [263]

(11) Freight Rate.

The contract price herein is based upon an Eastbound Transcontinental Rail Freight Rate on Hops of $1.50 per 100 lbs. in Carloads of 15,000 lbs. minimum and $2.00 per 100 lbs. in less quantity, and if the freight rate at time of shipment of any hops delivered hereunder shall be less or more than such rate, the difference in freight rate shall be respectively for or against the Buyer.

(12) Delays.

Buyer gives to the Seller sufficient extension in time for shipments and/or deliveries under paragraphs 5 and 16 to cover any and all delays arising from Fires, Riots, Strikes, Car Famines, Blockades, Wrecks, Quarantines or other extraordinary conditions beyond Seller's control.

(13) Prior Delivery.

Seller has privilege of making deliveries hereunder at any time prior to that herein specified for delivery, but in case of such prior delivery Buyers shall be entitled to allowance on the hops prior delivered, to cover all the ordinary carrying charges of Interest,

(Deposition of Gustav Pabst.)

Storage and Fire Insurance.

(14) Difference in Quality.

Difference, if any, between quality sold and quality hereunder shall entitle Buyer to equivalent allowance but not to rejection of delivery.

(15) Claims, etc.

The Buyer waives all rights to rejection or to allowances on any delivery on account of quality unless such claim be delivered to Seller by telegraph or in writing within 5 days after arrival of the hops at place of delivery, and unless such claim be so made prior to Buyer's exercise of any right of ownership of the said hops. [264]

(16) Subsequent Shipments.

If for any reason the Buyer shall be dissatisfied with, or object to all or any part of any lot or lots of hops delivered hereunder, the Seller may, within 30 days after receipt of written notice thereof, ship or deliver other hops of the contracted quality in place of any objected to.

(17) Quality.

The delivery by sellers of hops of a quality at least as good as any accepted by buyers from sellers on any then previous delivery under this or similar quality specifications, shall be a compliance as to quality under this contract.

(18) Sharing Advance or Decline Beyond 10¢ Per Pound.

Whenever at time of any delivery or part delivery hereunder, the market price of hops of the contracted quality, at place of delivery, shall be more than Ten

(Deposition of Gustav Pabst.)

cents per lb. either higher or lower than the within contract price, the excess over such Ten cents per lb. shall be equally divided between buyer and seller.

(19) Non-Transferable without Seller's Consent. The Buyer shall have no right to sell, transfer or assign this contract or any of the Buyer's rights or benefits thereunder without first having obtained the written consent of the Seller. [265]

The Pabst Company never signed either of said agreements or any similar agreement. I was familiar with the paper marked purchase order #54,808, dated September 8th, 1911, by H. J. Stark, Secretary.

To the best of my recollection Purchase Order #54,808 was never returned by E. Clemens Horst Company. I do not recollect any correspondence or negotiations between plaintiff and ourselves respecting purchase order #54,808, after it was sent to the plaintiff. A thorough search has been made for a letter from E. Clemens Horst Company and between Sept. 8th, 1911, and Sept. 28th, 1912, and none has been found.

It is stipulated and agreed that Colonel Pabst in giving his testimony concerning several letters and telegrams which, according to the language of the question or answer, have been presented to him, has referred not to originals as being before him, but to the copies attached to a stipulation entered into between the parties concerning said letters, except the two drafts or contracts, last referred to, I remember the receipt of a letter dated September 28th, 1912, signed by the plaintiff and addressed to the defendant, Pabst

(Deposition of Gustav Pabst.)

Brewing Company, relied upon the fact that the plaintiff sent the samples as evidencing plaintiff's compliance with the demand as to samples made in the purchase order.

Mr. DEVLIN.—I object to the question as leading, improper in form, and calling for testimony that is utterly immaterial and irrelevant.

The COURT.—Objection sustained.

Mr. POWERS.—Exception.

Exception #91.

Q. You may state whether or not as the question was put to you, you relied upon that understanding of the conduct of the plaintiff?

The COURT.—Same objection, ruling and exception.

Q. You may state whether or not the sending of the samples, as [266] evidenced by the letter of September 28th, 1912, influenced your mind as to the acquiescence of the plaintiff in the necessity for sending samples.

The COURT.—Same objection, ruling and exception.

A. I remember that defendant received a line of samples 1 to 20, about October 1st, 1912. I remember the sending of letter dated October 4th, 1912.

Q. Now you may state why, if you have any reasons you considered that E. Clemens Horst Company sent samples one to twenty.

Objected to as leading, immaterial, incompetent and improper.

Objection sustained. Exception.

(Deposition of Gustav Pabst.)

Q. Why did E. Clemens Horst send samples at all? If you have any reason for your belief that they did have any reason, or did not have any reason, to send them, please state one way or the other?

Same objection, ruling and exception.

I remember receiving a night lettergram dated October 9th, 1912, samples 1 to 20 when received were inspected by Mr. Zaumeyer, as to quality. After he had inspected them he reported to me if they were, in his judgment, what they should be in quality. He always reports to me the quality of the samples that are sent in whether they are or are not up to quality. He reported that samples 1 to 20 were not up to quality. They were not choice. I remember that the Pabst Brewing Company sent the telegram dated October 9th, 1912, saying that the samples showed no life. Picking poor and the like. I remember letter October 10th, 1912, from defendant to plaintiff and receipt night lettergram, dated October, 1912, from plaintiff and also letter dated October 14th, 1912. We sent the four samples so-called choice Cosumnes hops therein referred to, to plaintiff. I remember seeing night lettergram dated October 15th, 1912, and letter of the same date. I remember sending night lettergram dated October 21st, 1912, [267] reading as follows:

Milwaukee, Wis., Oct. 21–12.

E. Clemens Horst Co.,

San Francisco.

Will accept hops on tract equal to four samples

(Deposition of Gustav Pabst.)

you received from us but insist upon you forwarding samples of deliveries before shipments go forward.

PABST BREWING COMPANY.

Also remember receiving letter from plaintiff reading as follows:

San Francisco, October 24, 1912.

In reply refer to H–55641.

PABST BREWING CO.,

Milwaukee, Wis.

Gentlemen:

We received your wire of October 21st, as follows: "Will accept hops on contract equal to four samples you received from us but must insist upon you forwarding samples of deliveries before shipments go forward."

The above wire was no doubt sent before your receipt of our letter of October 18th, and we are now awaiting your reply to our above letter.

Faithfully,

E. CLEMENS HORST CO.,

ECH/PK. E. C. HORST.

Also letter dated October 23d, 1912, from defendant to plaintiff, reading as follows:

PABST BREWING COMPANY.

Milwaukee, Wis., October 23d, 1912.

E. Clemens Horst Company,

San Francisco, Cal.

Gentlemen:

Your favor of the 18th inst., at hand and contents noted.

(Deposition of Gustav Pabst.)

We beg to state that we never committed ourselves not to take the 2000 bales of Choice Cosumnes hops on contract, equal to the four samples we submitted to you, as you will note in our telegram to you of October 21st, to which we have no reply at the present time, in which we asked you to forward samples of deliveries you can make equal to the four samples mailed you, and furthermore, we beg to state that there was no specified time mentioned when hops were to be shipped, and the entailed loss you have had up to the present time by holding these hops has nothing to do with this deal whatever. If you could have delivered choice Cosumnes equal to the four samples mailed you we would have accepted same, but insisted on you forwarding samples, which you have not done up to the present time. We certainly would not accept any Cosumnes equal to any of your 20 samples submitted to us, as the quality is too poor. Furthermore, we beg to state that our relying to dispose of same on the Coast would not prevent you from forwarding samples, as we must insist upon seeing what we buy. [268]

We are also desirous of letting you know that we use Cosumnes and Sacramento hops in our brewery, but of a much better quality than any of your samples submitted. What we have published is that we would not use any more Cosumnes like your 1911 shipment, which you must admit were the poorest picked hops on the Coast. We are also not at liberty to let you know from whom we received the four samples choice Cosumnes, but must insist upon you

(Deposition of Gustav Pabst.)

forwarding samples of choice Cosumnes equal to the four samples, whether you have same in stock or not.

Hoping to hear from you, we remain,

Yours truly,

PABST BREWING COMPANY,

CZ–M. By C. Z.

I recall the receipt of letter dated October 29th, 1912, from plaintiff reading as follows:

San Francisco, Oct. 29th, 1912.

In reply refer to H–57158.

Pabst Brewing Co.,

Milwaukee, Wis.

Gentlemen:—

1912 CROP HOP SALES.

Received your favor 23rd inst.

By special Delivery mail we send you to-day a line of samples #25 to 38 inclusive, equal to which we are ready to make deliveries to you.

We have just satisfactorily completed a 1500 bale delivery of 1912 Choice Hops to one of our Middle West clients. These 1500 bales were on the same line of samples as above sent you.

Faithfully,

E. CLEMENS HORST CO.,

ECH/J. E. C. HORST,

I have been engaged in the brewing business since 1884. Of course from my experience and occupation I have acquired a general knowledge of the hop market conditions. I am familiar with the purchase of hops by samples. Each of the four samples forwarded by us to plaintiff were the part of a

(Deposition of Gustav Pabst.)

sample. The other part was kept in our storage house in possession of Mr. Zaumeyer. The line of samples referred to in the letter of October 29th, exhibits 25 to 28, were received by the defendant. Basing my answer upon my knowledge and experience and understanding of the hop trade and business, it is not commercial usage to buy [269] or accept delivery of 2000 bales on one partial sample.

Q. You may state whether or not all of these samples 25 to 38 were choice.

A. There was one small sample in the lot that was choice. A very small sample. It would not be practicable to purchase or accept the delivery of 2000 bales of hops upon the submission of one partial sample, such as 25 to *28*, because I do not think any man could pick up 2000 bales of hops, that would be identical with any one sample, large or small. I do not recall ever having bought to exceed 75 *of* 100 bales on one sample. Because large variations are bound to occur in large deliveries. During the last ten years I have been president of the company I have been an actual member of the corporation and have been obliged to supervise the purchase hops. The custom with reference to sending a line of samples varies to a considerable degree. We purchase sometimes state hops, lots consisting of 10, 15, 20 bales, and we usually receive two or more samples covering the early and the late picking of these small lots. There is a general custom with respect to submission of one sample covering even smaller quantity than 50 to 100 bales. I remember sending lettergram

(Deposition of Gustav Pabst.)

dated November 4th, 1912, to plaintiff. This telegram refers to samples 25 to 38, or for that matter to all of them. It covers the entire transaction, but that is the cancellation of the contract. I remember receipt of night lettergram dated November 5th, 1912. I do not think there were any letters, telegrams or otherwise, respecting the time of delivery other than what have been shown and testified to in this deposition.

I remember sending day letter November 7th, 1912, to plaintiff. Because of the failure of plaintiff to deliver hops of the agreed quality we were compelled to purchase hops elsewhere, because the season was getting later, and from the market reports as we [270] were getting them, the prices were going up above the price contracted for with the Horst Company for the 2000 bales. I do not see any reason why 2000 bales of Cosumnes hops could not have been in market if they were choice. The fact of the matter is I think choice hops can be marketed easily any time prior to the *month* of December and January, because as a rule the heavy buying takes place at and shortly after the opening of the season, and as the time goes on the choice hops become scarcer. I cancelled the contract because we had not been able to receive samples which were satisfactory, and because the price of hops was increasing, was going up, and we had to cover our requirements. At that time even the choice hops were not very plentiful on the market.

Q. Did Mr. Zaumeyer, to whom you have referred

(Deposition of Gustav Pabst.)

in your testimony, report to you his findings in respect of the various samples submitted by E. Clemens Horst?

Objected to as hearsay testimony. Objection sustained, and exception.

Q. You may state whether or not it was his duty to make report to you as the president of the corporation upon the inspection of such samples? Same objection, ruling and exception.

Q. What did he report? Same objection, same ruling and same exception.

Q. What report, if any, did he make in respect of the quality of the last samples sent, 25 to 38, the four samples you sent to Horst?

Q. What was your understanding, if any you had, at the time the E. Clemens Horst Company asked you to send samples of such Cosumnes hops as you would accept?

Mr. FOSTER.—I object to what his understanding was as incompetent and immaterial. Objection sustained and exception. [271]

I am not certain whether I had any conversation with E. Clemens Horst in respect to the 2,000 bales of hops upon which this suit is based prior to the communications about it.

Q. When those samples 1 to 20 were sent, why did you think they were sent?

Objection, immaterial and incompetent. Same exception.

Q. You may state whether or not you relied upon the conduct of the plaintiff in sending the samples

(Deposition of Gustav Pabst.)

referred to as evidencing its acquiescence in the demands of the so-called triplicate purchase order, No. 54,808.

Objected to as incompetent and immaterial. Objection sustained. Exception.

In a general way I remember Mr. George on the part of plaintiff was up here and speaking about our rejections and the cancellation of the contract. I think it was after the cancellation because his object was to have us withdraw the cancellation. I remember having a conversation with Mr. Gerber connected with plaintiff over the long distance telephone in connection with this dispute. Samples 25 to 38, with the exception of one small sample were not of the same high quality as the four samples which were sent to Horst at their request. We were convinced after the attempts made by Mr. Horst to comply with the terms of the contract in sending us samples which he did, and which were not acceptible, that he either could not or would not deliver such hops as were specified, and, as the market price of hops was on the incline, and we had to have large quantities of hops, we had to buy in the open market, and in order not to overstock, of course had to cancel the contract with Horst.

Cross-examination by Mr. FOSTER.

My entire experience in buying hops has been more of a supervisory nature than one of actual purchase, and that covered [272] California, and state hops, Wisconsin hops and imported hops. I do not think we have used any large quantities of Cosumnes hops

(Deposition of Gustav Pabst.)

in our brewery. I could not estimate how many bales we had used. We brought some of the 1911 crop from Mr. Horst. We generally buy a special kind of California hops. We bought Sonomas, Russian Rivesr. I do not think there would be any difference between the better grade of the Sacramento hops and the same quality of Yakimas. The same would be true of Oregon. One must make it his business to be absolutely certain in making a distinction and being able to pick the various kinds of varieties. You may have a thin California hop with very little lupulin, and you might find a heavy hop with a large quantity. You may find the same condition in New York state. The New York hops generally sell better than the Pacific Coast. Sometimes there is a difference of 25¢ and sometimes more. Whether they are better for brewing purposes depends entirely upon what the brewer *want* to produce. There have been many discussions as to the quality of the various hops which are grown. We have grown a hop here that we considered in point of results equal to any imported hop we have been able to buy, and the fact of the matter is that it cost us just as much to raise it as we could buy imported hops for. We are not in the hop business, except as buyers. We sell at infrequent intervals. We usually buy our requirements here. I was quite willing to sell a portion of this 2,000 bales Cosumnes. I do not know whether I talked with Mr. Horst upon the subject or not. I know there was some correspondence on the subject. I do not remember whether I made any proposition to Mr. George

(Deposition of Gustav Pabst.)

about the price for which we would sell the Cosumnes hops. I presume from the reference to letter of September 28th, there must have been talk about me selling, with him. I do not think we offered to sell. On October 15th, we wired Mr. Horst that we must see [273] the samples Cosumnes delivered equal to four samples because we expected to dispose of the same on coast, but we did not necessarily mean, we expected to sell a part. We intended in the first instance to sell some of them, but we are not in the business of buying and selling hops. We were convinced that the price at which we were buying them was very low, 20 cents a pound. We expected either to make a profit on them by either disposing of them or having enough to carry us over, that is, carry us over into the following year, but we considered the price of 20 cents a very low price at the time. I do not recall that Mr. Horst has showed us he could sell them for 25 cents, but I am inclined to think not. I would not deny or affirm that I fixed the price at 27 cents, but I do not remember. I would not say. It is quite possible that I would not put it that way. I do not remember. When you show me telegram from E. Clemens Horst, dated September, 1912, saying, "we cannot accept your offer to repurchase thousand bales Cosumnes hops at 22 cents as we are selling below that figure Please wire," it does refresh my memory. I have had so many interviews at different times with various people on this and on other hop situations and matters that I would not say. I can refresh my memory from this. I think Mr.

(Deposition of Gustav Pabst.)

Zaumeyer made some attempt to dispose of a portion of the hops, but he did not go out for that purpose. He went out for some other matters and incidentally he may have had some conversation with some people upon the prospects of this sale. I have some recollection of it but not as to date, or just when these offers were made or when these various conversations were had.

I have no recollection independent of letters when the first samples were received. There was a large crop of California hops in the year 1912. The 1911 crop was very much higher, but [274] I cannot remember a very rapid decline of the 1911 crop. I do not think the market since November 1st, 1912, and February 1st, 1913, dropped at all for choice Cosumnes hops. I never heard of any fifteen-cent offer being made any where for choice Cosumnes hops. I did not know that a large amount of the 1912 crop was carried over to the 1913 season. I did not know that the 1913 crop in the spring of 1913 sold for about twelve cents, and I do not think it was so. They sold better than that. We had no offers from any one at that low figure. We had a search made in our office for a letter pending our previous order. All the mail that comes into the brewery does not come to me personally but it is brought up by our own carried and given to one of our clerks, who opens all the mail and distributes the letters to the various departments, wherever they may belong, such as the purchasing department, sales department, architect department, engineers department. Each depart-

(Deposition of Gustav Pabst.)

ment has its own separate file in the mail. Some of the departments have files where they temporarily keep things, but all the other departments except the advertising department files their letters permanently in one file. Our man who has charge of that would know the detail exactly, how the letters are received and filed. We had a request to get together all the correspondence concerning this contract and we did it. We made a diligent search. I did not make it personally, but gave the order that the search be made. The same as you do when you tell your office boy you want a letter, you do not absolutely go after it, you send somebody after it. I told them to make the search. I happened to see some of it made myself by Mr. Zaumeyer looking through his files in his desk, and I happened to come into the vault one day when some of the old files were being gone through, looking for correspondence on the subject, I was there when some of our employees were making the search. That happened at different times as the matter became of deeper interest. [275] We looked for one letter and then we looked for another and finally we looked over all the files, in that way, so far as I know, and I can testify that to the best of my knowledge and belief there is not any more correspondence on the subject than what we have produced in our files. All the letters that come to the brewery are preserved, except advertising and things like that. We make an attempt to keep every letter that is received and we make an attempt to keep copies of the letters that we send out. We have em-

ployees who have been with us for many years and we have right and reason to trust their statements.

Referring to the telegram dated August 22d, 1911, I would not say that I remember that particular telegram, but I remember it was part of a discussion I had with Mr. Zaumeyer. I am not going to testify that I found any of these telegrams or letters. I would not attempt to pick out any specific letters or telegrams my people in their search found.

Q. Will you point out to me any specific letter that your people in this search found?

A. No, I would not attempt to do it. I know that the original of some of these letters were found in our files. I would not say all of them.

Q. Isn't it a fact that your people did not find a whole lot of these letters that you are now willing to stipulate in your search were made by you, that you failed to find copies of many of them?

A. Not to my knowledge. I only understand in a round about way some of the letters were not produced.

Q. Take this letter dated March 16th, 1913, letter from E. Clemens Horst Company to the Pabst Brewing Company. Was that letter found in your files?

A. I would not be surprised. I remember several requests from Mr. Horst to answer his correspondence after we had told him [276] that we had no further comments to make on the situation.

I did not find any letters personally, as I stated before, and I did not send any letters or correspondence to our counsel in California.

(Deposition of Gustav Pabst.)

My refusal is simply based on the fact that I made no personal search and I cannot tell by these copies which letters were found in our files and which were not found in our files and that is a perfectly sane statement to make and a perfectly proper statement.

Q. Referring to letter of October, 10th, 1912, "Pabst Brewing Company by CZ to E. Clemens Horst Company, San Francisco, California: Gentlemen, in reply to your telegram of to-day we beg to state that we have forwarded you four samples of choice Cosumnes hops. Kindly compare these with your samples and oblige," in your search that you made or had made, did you find that letter?

A. I refuse to answer other than the answer which I have given, that I found none of these letters myself.

Q. And you don't know as a matter of fact whether any of these letters that related to the 2,000 bale transaction between yourself and the Horst Company were actually found in your files or not, do you?

A. I do, because I have seen the originals.

I do not remember any specific or particular letter, but I do know that search was made and a great number of them were found, because I had them in my own hands and read them and they were taken out of our files. I would be compelled to give the same answer to the letter of March 1st, 1913, to the Pabst Brewing Company and signed by the E. Clemens Horst Company beginning "Gentlemen; received your favor of February 7th."

Q. That is, you do not know whether you got it or not? [277]

(Deposition of Gustav Pabst.)

A. I did not say, I don't know. My answer there is very clear and concise on that incident.

The four samples that were sent out to the Horst people, 21 to 24 were Cosumnes hops. The only way I know was that I was told so. I could not tell from my examination whether they were Cosumnes hops or Russian Rivers. I personally saw the four samples. I was able to see that they were such hops as we were accustomed to buy, but I did not know whether they were Cosumnes hops or not. Our custom is to get one sample for every fifty to 100 bales. We occasionally get samples representing 10, 15 or 20 bales. As a rule we receive at least one sample for lot representing 50 to 100 bales.

Q. Then for four samples submitted to you, you would not expect to buy in excess of 400 bales?

A. That may depend upon whom we are dealing with and upon circumstances. There is no hard and set rule that one sample represents an equal number of bales. It is just a general custom to receive more than one sample for any quantity of hops that you buy. We would want 25 samples for the 2,000 bale order at least. I might want more. There is always some variation in almost every bale. It is very seldom that you draw samples out of the two bales that are supposed to come from the same consignment or shipment or from the same yard that are absolutely identical in every part of the same. They are apt to vary some, even in the bale at times. They might be choice. I cannot distinguish by examining samples whether hops are kiln-dried or air-dried. I can tell

(Deposition of Gustav Pabst.)

if a hop is too dry and I can frequently detect by the odor whether a hop is over dry. The particular reason I objected to samples 1 to 20, was that a great many of the samples were broken, indicating possibly that they had been baled when they were too dry, and because they were not up to the choice quality. [278] They were not in color and lupulin. Some of them had sufficient lupulin, but not the right color. I rejected *to* them finally on the finding of Mr. Zaumeyer, in fact altogether. I cannot leave him out because he is a factor in the matter. I go by Mr. Zaumeyer's judgment because that is what he is employed for, because he is an expert in that line. I inspected them myself. We had been an hour or an hour and a half in discussing the conditions with Mr. Zaumeyer. Part of the time we were out looking at samples, comparing samples and discussing the situation. I do not remember discussing the hop market. The discussion was almost entirely on the quality of hops. We discussed the contract, because the contract called for choice hops. I had seen some other 1912 coast hops, but I do not know whether they were Cosumnes or not. The fact of the matter is that I inspect or look at very few samples that are submitted because Mr. Zaumeyer attends to that altogether. When he accepts samples, I frequently look at them and when I reject samples as a rule I look at them. I tested the flavor of most of these samples. I do not say that I tested each and every one. I am not in a position to qualify as an expert, and I am not relying on my judgment in the matter entirely.

(Deposition of Gustav Pabst.)

The fact of the matter is my own judgment plays a minor part in the acceptance or the rejection of any samples submitted. Later I inspected in the same way samples 25 to 38. They were called to my attention by Mr. Zaumeyer, and I looked them over, yes, I tested some of them, most of them and found the flavor lacking in some of them. I cannot detail at this time the different findings of each and every sample for some of them may have been good in some respects and bad in other respects. Some of them lacked in luster, color and life. A choice hop is one that has good qualities, good flavor, good in color and good quality and [279] quantity of lupulin. I would not consider any hop a choice hop that was lacking any one of those qualities. I do not mean to say that the color may be green or yellow, but when a hop has a dead color and is otherwise sound, I would not call that a choice hop. I would not take it upon myself to testify or to qualify or make any distinction. If I had to accept a hop as choice I would not lay so much stress on color as I would on lupulin, quality and quantity of flavor. The flavor, lupulin and quality are the important things. You could not have a choice hop unless the three were present and all cleanly picked. I do not mean to say I can always distinguish, but I would not rely upon my judgment to allow myself to always distinguish all these as necessary parts. I do not believe that a hop lacking what is considered good color, the right kind of color, and having all the other necessary qualifications, would be called a choice hop. I have always

(Deposition of Gustav Pabst.)

accepted Mr. Zaumeyer's judgment on the quality of hops. In an order of 2,000 bales there would not be any variation so far as flavor and lupulin is concerned, and they must be clean-picked, but there may be a variation in color, because no rejection can be made of a choice hop, if it is sound in every way, and if it was green or yellow, because some people prefer a green hop and some people prefer a yellow hop, and the variation naturally would be in the color of the hop, ranging between greenish and yellowish, as to the time that it was picked. But if it is mixed with a lot of leaves and stems, of course that would disqualify it from being choice. It is not a custom of the hop trade to consider as choice hops that were not choice because previously all the choice hops had been exhausted. I cannot conceive of an article being changed simply because the better article is gone. Choice would not vary from year to year owing to conditions. It would not be the best of [280] any year's crop. I do not believe that the standard of a hop has to vary from year to year. A hop that is choice must always have standard qualities of flavor, cleanly picked, soundness and brightness of color. It would apply to all kinds of hops, New York, Cosumnes and California. We did not give the Horst people an opportunity to present further samples because we had already purchased other hops, and cancelled our contract. It was too late to consider any further samples from them. It looks to me that the more inferior the quality acceptable to us, the cheaper they could buy it, and the more money

they could make on it. The statement made in one of the letters by Mr. Horst was that they were sending us samples of hops that they had and they were willing to buy others.

Q. Your contract called for 2,000 bales of Cosumnes hops, and in order to fill that contract, all of the hops delivered would have to be Cosumnes hops? Would they not?

A. The last phase of the situation came down to a question of submitting samples and buying and accepting according to sample and not according to contract. Horst signified his willingness according to samples submitted by us. I don't know whether if they had tendered us the best 2,000 bales of 1912 Cosumnes hops it would have been a complete performance of our contract, because I am not in a position to say what the best 1912 crop was. I did see the samples which I was informed represented Cosumnes hops and it was satisfactory to me. Samples 21 to 24, and if the 2000 bales had been equal to the four samples which had bee sent them we should have accepted them. I do not know what the very best Cosumnes hops looked like, because I may not have seen them, but because I did see what purported to be Cosumnes hops and on the basis of the samples which I did see, I was [281] willing to accept delivery, and Mr. Horst never indicated that he could not send us hops that were equal to the samples, or said that the hops were not raised in the Cosumnes that year that were equal or not equal to those samples. Whether brewers contract for hops during the win-

(Deposition of Gustav Pabst.)

ter months before November 1st, or any year, depends upon the condition of the crop and the purse of the brewer and various other conditions. Some people buy from hand to mouth; some people lay in a big store, sometimes people lay in a two years' supply, or in excess of one year's supply when hops are cheap, &c. &c.

Big brewers sometimes start buying when the season opens up and probably buy in lots of 100 or 200 or 300 or 500, from various dealers, until they have their full supply. It happens occasionally that the business increases or is very much better than anticipated, and I have known people to buy hops sometimes late in the season, not from choice but from necessity. I do not believe that brewers have bought practically all the hops they needed in 1912, prior to November 1st, 1912. I have no knowledge but the chances are they did not because the hop season runs way into December, January and February. That is the usual condition. There are peaks in the brewing trade. We have to purchase our summer supply and that is our high peak. That begins along in January and December. We begin to brew hops in December and keep it up to July and August, then we drop down again. During the winter of 1912 and 1913 we were nsing the 1912 crop, and we would be doing that until the new crop of 1913 came in. We usually begin in September. We cannot take in all of our hops any more than we can all of our barley in one month or in two months. We have to distribute it over a period, because we are not

(Deposition of Gustav Pabst.)

in a position to handle more than a given quantity. We have a special hop storage hop house that is kept at certain temperature. [282] We can store about three or four thousand bales. I do not think we bought any Cosumnes hops in 1912, outside of the Horst Company hops but we did buy Sacramento. About 250 bales under a contract we had made some time previous. I have a recollection of sample #36. I was told later on that it was a part of one of the identical samples. Not from Mr. Zaumeyer but from another source. In my opinion all the samples 25 to 38, exclusive of 36, the small sample, were distinctly inferior to 2*t* to 24, but as I say I do not rely upon my opinion and my judgment of them. I have no recollection of ever having received letter dated August 31st, 1912, apparently signed E. Clemens Horst Company. I was not prepared to swear that I have never received it, but I have no recollection either way. The substance of the letter does not refresh my memory.

Cross-examination and Direct Examination by Mr. SPOONER.

In the months of November and December, 1912, we purchased hops, due to the alleged failure of the plaintiff to deliver us hops as required by the agreement. We bought hops in November and December, 1912, from P. A. Livesly & Company and C. C. Sweeney & Company. I refresh my memory from the original papers received from them. The papers shown me are accounts received by Pabst Brewing Company at the dates each of them bore date.

(Deposition of Gustav Pabst.)

These statements were received by Pabst Brewing Company. I remember the receipt of the statements. I know the facts in the mattter and I refer to the papers only as to the quantity which was purchased. I know we bought from both Sweeney and Livesly, during the months of November, 1912. This is very fresh and very vivid in my memory. I also recognize the checks and vouchers of the Pabst Brewing Company given to pay these bills. The check of the Chemical National Bank of New York, dated January [283] 29th, 1913, serial number 62,980, signed by the Pabst Brewing Company was in payment of the bales of hops purchased from them, C. C. Sweeney & Co. Check for $12,316.89 to C. C. Sweeney & Co. was in payment of these bills. I also recognize the statement of accounts of T. A Livesly & Company. They are the bills received by us from T. A. Livesly & Company for the purchase of hops in November and December. The hops therein referred to were received by us and that *the a* correct statement of the account and price. I also identified check Pabst *Brewing dated* January 29th, 1913, in payment of the bills received from Livesly, marked BB and CC. The bills correctly state the amount and price of the hops therein referred to and the same were delivered to us in the due course of business and I recognize the bill of C. C. Sweeney & Company, dated November 21st, and check in payment of the bills. These hops were received and paid for as specified, and the check was paid. The bills and checks correctly state the

amount and price, and to my knowledge the hops therein specified were received as specified.

The prices therein stated were correctly stated, and the amounts stated in the checks were actually paid to the payees therein named. We purchased these hops because we required them. We had to have them in our business and to replace the hops which under the contract *with* E. Clemens Horst Company failed to deliver to us.

The hops purchased by us were as follows:

From T. A. Livesly & Co. on Nov. 25, 1912.

100 bales containing net 19,332 lbs. at 21¢ per lb., delivered.....Total	4,059.72
Less freight.....	297.50
Net.....	3,762.22

[284]

On Dec. 24th, 1912, 80 bales of hops containing 16,496 lbs. at 23¢ per lb. delivered..... .....Total,	3,794.08
Less freight.....	292.26
Net.....	3,501.82
On Nov. 25, 1912, 156 bales hops containing 31,083 lbs. at 23¢ per lb. delivered.... .....Total,	$7,149.09
Less freight.....	487.50
Net..... ....$6,661.59	

(Deposition of Gustav Pabst.)

On Nov. 25, 1912, 100 bales hops containing 19,441 lbs. @ 22¢ per lb. delivered.....	Total,	4,277.02
Less freight.....		301.50
Net.....		3,975.52
From C. C. Sweeney & Co., on Nov. 14, 1912, 93 bales hops containing 16,837 lbs. at 22¢ per lb. delivered.....	Total,	$3,704.14
Less freight.....		259.53
Net.....		$3,444.61
From C. C. Sweeney & Co., on Nov. 13, 1912, 89 bales hops containing 16,988 net at 22¢ per lb delivered.....	Total,	$3,737.36
Less freight.....		261.53
Net.....		$3,475.83
On Nov. 21, 1912, 250 bales hops containing 47,385 lbs. @ 22¢ per lb. delivered.....	Total,	$10,424.70
Less freight.....		741.25
Net.....		$9,683.45

Check Pabst Brewing Company, Milwaukee, Jan. 29, 1913, #62980. Pay to the Order of C. C. Sweeney & Co..... .....$9683 45/100

(Deposition of Gustav Pabst.)

Ninety six hundred eighty three and 45/100 Dollars.
To Chemical National Bank.
New York.

PABST BREWING COMPANY.
By I. M. EWING.

Check #62981, $10163.41. Payable to C. C. Sweeney & Co.

Check #62861, $12,316.89, payable to C. C. Sweeney & Co.

Hops purchased from C. C. Sweeney & Co., on Nov. 15, 1912.
150 bales hops containing 26379 lb. @ 22¢ per lb. delivered.
..... Total, 5,803.38
Less freight..... 406.93

Net..... 5,396.45

Check #62,862, for $7,737.74, payable to C. C. Sweeney & Co.

Q. Did you have understanding as to reason E. Clemens Horst Company, the plaintiff herein, sent samples as stated in his letter of September 28th, 1912, which were samples 1 to 20 inclusive? [285]

Objected to as immaterial and incompetent.

Objection sustained and exception.

Q. You may state whether the receipt of the samples one to twenty had any influence upon the conduct of the business of the Pabst Brewing Company.

Objected to as incompetent and immaterial.

Objection sustained and exception.

(Deposition of Gustav Pabst.)

Q. Did it lead the Pabst Brewing Co., or did it not lead the Pabst Brewing Company to rely upon the acquiescence of the E. Clemens Horst Company in the compliance with the purchase order respecting the delivery of samples?

Same objection, same ruling and same exception.

Cross-examination by Mr. FOSTER.

These bills were taken out of our files. They have been checked over by our people who do these things and have charge of the various matters, and the checks have been made out in the regular routine, and are genuine, and are in payment of these bills, being the same as the checks, and the checks denote that they were cashed and cancelled and the money received therefor by the payees who sold us the hops. They are made out on the dates that would correspond with the dates of the bills, going through the regular routine of receiving the hops and inspecting them. I have no knowledge of the number of bales, except what the bales show. I refer always, in matters of that kind, to either our books or such accurate records we keep of all our transactions. The purchase made in November was for delivery in December.

I am not sure that any purchases were made from Sweeney & Co. and Livesly & Co., other than the bills show here in November and December. Our books give the exact date, the exact number of sales, and exactly what was paid for every pound [286]

Q. How do you know but that some of these checks here were given in payment of other purchases

of hops from Sweeney and Lively & Company, if you do not know whether or not you did buy others?

A. Because it would be a very strange coincidence, with the bills presented here, and the checks presented here, marked exhibits from "AA" to "LL" inclusive, should tally as to the amounts and as to the time, about, when payments would naturally be made. If you will kindly look over these bills you will see that two or three bills at different times have been footed, the amounts have been footed, and these various amounts taken from the bills and the total amount tallying with the amount of the check. In some instances the checks are made payable in the payment of a single bill, I believe, and in other instances there are several bills added together. Now, if you will kindly let me look that over I will answer your question.

Q. You are seeking to recover damages against the Horst people here for a breach of an alleged contract that you claim was made with them to deliver to you two thousand bales of hops, are you not?

A. I don't know of any such action.

Q. You are not familiar with that? What are you trying to recover damages for?

A. I say I don't know that any such action is pending.

Q. You are familiar with the issues in the case, so you testified?

A. I am familiar with that part of it which refers to an attempt on the part of the E. C. Horst Company to recover damages from us for the so-called,

(Deposition of Gustav Pabst.)

as you term it, alleged contract.

Q. You knew that your counsel had filed what is known in law as a counterclaim in this case? [287]

A. I didn't know that a counterclaim had been filed.

Q. What did you think was the purpose of your counsel here in introducing this morning these so-called Sweeney bills and Livesly bills, and checks connected therewith?

A. I suppose counsel could answer that better than I.

Q. You are not, then, trying to prove up any damages against Horst & Company?

Mr. SPOONER.—I object to that as a matter to be determined from the pleadings and not from the statement of the witness.

A. I am not conducting this case. I am simply a witness and I am answering such questions as are put to me by counsel. I do not propose to intend to *pay* any particular construction or motive on his questions.

Q. Was it due to any alleged failure on the part of the Horst Company to deliver to you two thousand bales of hops under the contract that was made between you in 1911 of the 1912 crop that you went into the market or somewhere else and bought hops from Sweeney and Livesly?

A. I testified yesterday that because of the failure to deliver to us under contract, and because of the fact that we could not wait any longer to lay in our neccessary supplies and stock, we went out into the

(Deposition of Gustav Pabst.)

open market and bought hops for our use, because of the failure of E. Clemens Horst Company to deliver under contract.

Q. When you sent out samples 21 to 24 to the Horst people, which samples I now show you, marked Defendant's Exhibits 21 to 24, you were willing to accept from the Horst Company 2000 bales of hops equal to any one of those samples? A. Yes, sir.

Q. And consequently when you received back from the Horst people samples marked 25 to 38 inclusive, you examined those samples and [288] found that one of those samples, as I understand, was equal in quality to 21 to 24, which you had sent out?

A. Is that my testimony of Mr. Zaumeyer?

Q. Well, isn't that a fact, without regard to your testimony?

A. That is the fact. It has been reported to me by Mr. Zaumeyer.

Q. Well, you examined them, too, at the time?

A. I looked at them.

Q. And it is your opinion that one was equal?

A. I believe that I said either that I found from my own judgment one to be like it or similar to it, or that it had been said to me, or that I had been informed, that was the case.

Q. Well, *I* didn't you look at it enough yourself to have any idea as to whether or not it was equal to it?

A. I don't know that I could answer that question right now.

Q. Will you kindly look at these samples, Colonel

(Deposition of Gustav Pabst.)

Pabst, and tell me, if you can, indicate any one of them that is equal to any one of these four.

A. I cannot qualify and my judgment would probably be satisfactory only to myself, and not work anything as conclusive and proper evidence.

Q. I ask that the witness examine these samples and give us his opinion on them whether or not any of the three samples submitted here are equal in quality to samples 21 to 24. Will you do so?

A. No, I will not do so—because I do not care—

Mr. SPOONER.—Go on, do it.

The WITNESS.—Well, I don't know. What is the use?

Mr. SPOONER.—Well, then, when you examine it say you don't know.

Mr. FOSTER.—Q. Here are three samples and here are four samples. These four samples down below are the four samples, 21 to 24, forwarded [289] by you to the Horst people. These three samples up here are the three samples that were returned by the Horst people to you, being three of the samples numbered from 25 to 38 inclusive, three out of those.

Now, will you please examine the three and advise us which one of the three is equal in quality to the four?

A. I am not able to state.

I have not sufficient familiarity with the hops to determine that.

I would not be able to tell which of the three Horst samples is the choicer hop.

(Deposition of Gustav Pabst.)

My knowledge of the hop business is not sufficient to allow myself to make a statement that would be considered by those who make the hop industry their business of any value.

I do not assume to distinguish between a prime hop and a choice hop, from the inspection of the sample. Nor whether that particular sample was air-dried or kiln-dried.

I can tell stems from burrs, of course; I should see a hop full of stems, I would naturally say it was not cleanly picked. It does not need an expert to do that.

I cannot answer whether the sample shown me would be considered a choice hop or whether I would judge it as being dirty. I would not trust to my own judgment as to rejecting it. Referring to sample #35.

I have not qualified to make any statement regarding the question you asked me, whether these hops are prime or choice or whether I would reject them because of their being dirtily picked, or any other qualification which they may have.

I would not trust to my own judgment in a matter of that kind. I have never intended or passed as one who can determine to make a settlement as to quality of hops. [290]

It is not a question of picking alone. There are other qualifications that naturally must enter into a hop to make them a certain quality.

I do not know the percentage of leaves that is re-

(Deposition of Gustav Pabst.)

quired to make a hop objectionable, as to a certain grade.

I cannot pass upon samples to determine whether or not there is lupulin enough in them.

The evidence refers to sample #37.

Referring to the two documents dated September 8th, 1911, one of which is purchase order #54,808, and the other of which does not seem to have that written on it, I cannot account for their being two documents. I suppose we made them in triplicate. One we kept and two we sent for the signature. I do not remember whether one was ever returned signed by the Horst people. According to our usual custom, we send out two to have one sent back.

All the shipments concerning which I have testified as being represented by exhibits "AA" to "LL" were made, less freight, or subject to reduction of freight to Milwaukee.

About 180 pounds would be the average weight of a bale of hops.

Because of the failure of the plaintiff to deliver us under the contract and because of the fact that we could not wait any longer to lay in our necessary supplies we went into the open market and bought hops for our use. The contract for the purchase of 1912, as evidenced by our purchase order No. 54,-808 to plaintiff and the correspondence relating thereto. It subsequently states that shipment must reach us during October, November, December, January or February. One of the sales from Sweeney was made for 332 bales on November 4th and the

price was 22¢, less freight Milwaukee. It was made from a sample. It is the same Mr. Sweeney who furnished us samples 21 to 24. I do not know where [291] the goods in this 332 bales were grown, except that they were grown on the Pacific Coast. These hops were not bought for speculation. We are but in the business of buying hops for speculation. I did not buy the Horst crop 1912 to resell, but I said I would consider the matter of resale, or a part of them possibly, even when we bought them. I might have had some probably undeveloped and not clearly defined thought in my mind. I considered the purchase at that time, at the price, a very good buy, and I think so to-day and it was *a* good. I do not remember that I made an attempt to sell 1000 bales of this order on the coast.

Referring to telegram of October 15th, I do not remember whether we made an offer or whether we had an offer. I do not recall anything about it. As late as the middle of October, we were relying upon Horst 1912 Cosumnes for running out brewery during the winter of 1913. The hops bought from Sweeney were choice hops. All of the hops purchased were choice hops. My recollection is that I saw the various samples upon which these hops were bought, but I am not positive. They were all Pacific Coast hops, but I do not know from what section of the coast they came. One of the purchases represented a grade not as good as the choice hop that we had been buying, and this was the only thing that was left in the market. I have no recollection

(Deposition of Gustav Pabst.)

as to which took place first, the cancellation of the contract on November 4th, or the purchase from Sweeney on the same date. I cannot recall the hour of the day on which we sent the telegram dated November 4th, 1912. I instigated the sending of the telegram, I may have dictated it or I may have told Mr. Zaumeyer to send it. When I sent out samples 21 to 24 to the Horst people, I was willing to accept from them 2000 bales of hops equal to those samples. [292]

[Testimony of Charles Zaumeyer, for Defendant.]

CHARLES ZAUMEYER, recalled for cross-examination.

Mr. Sweeney first came to see me to sell hops in November, 1912, not before the 4th, about the fourth. He brought some samples with him. I think it was the same day we cancelled the Horst contract. We bought 352 bales that day. I think it was in the afternoon. I do not recall whether it was before or after the telegram was sent to Horst or whether I sent Horst the telegram or Mr. Pabst. Sweeney would come to see us very often—every time he came to Milwaukee. I do not remember to have been at the brewery more than once in November and I do not remember what he said about Cosumnes hops at that time. He did not tell me that he had seen the Horst crop. He said nothing at all about the Horst hops nor about Cosumnes hops. He did not offer us any hops before November 4th. We asked him on November 4th, if he had any choice hops. He said he had and we did not care whether

(Deposition of Charles Zaumeyer.)

they were Cosumnes or not so long as they were choice. We got the samples to send to Mr. Horst early in October from Mr. Sweeney. Mr. Pabst asked him if he had any choice hops and he said the next time he went to Chicago he would look and see, and the next time he came he submitted us these four samples, and I asked him if they were the best he had and whether they were Cosumnes hops, and he said they were. I, myself, did not know whether they were Cosumnes. These hops are from prime to choice. He did not say they were choice, he said they were the best he had. I did not ask him if they were the best that could be obtained. The brewery uses 3500 to 3800 bales of domestic hops each year. If we had the right quality, we could use 2000 bales of Cosumnes hops, one-half. We use Bohemia hops in our beer and very little New York hops, and sometimes Washington hops. We take about half domestic and half imported hops, making a blend of them. Colonel Pabst [293] and myself buy all the hops. We have seen good hops from every section of California. We do not use Oregon hops. If the brew master wants Oregon hops we buy them. An Oregon hop is more sightly than a California hop. It is a different character of a hop. Washington hops and California hops are about the same. They are no higher in the market. I do not know that Yakimas are the highest Pacific Coast hops. I did not make up my mind to sell any of the hops we bought from Horst. We did not try to sell them. I had no intention of selling them. Mr. Pabst never

(Deposition of Charles Zaumeyer.)

said anything to me about his intention of selling them. I never talked to Mr. Livesly of Oregon about selling them. I never made any endeavor to get a price on them. I had no right to sell anything without Colonel Pabst's consent. I did not know that Colonel Pabst was willing to sell if he got a fair price. If anybody had made us the right price we might have sold, but nobody made us a good proposition. I can tell Cosumnes hops from Oregon hops and from New York hops, within a certain period of time after they are harvested. I cannot distinguish one district of California from another. I asked Mr. Horst what he would sell a portion of his contract for when I was on a visit to his ranch in 1912. He said he was a seller and not a buyer. I was just feeling how strong the market was going to get. It did not make any difference, I just did it for a feeler. It is not a habit of mine, but I have a right to do it. I had no intention of selling them. I could not sell them to him if he offered me $1.00 a pound. I had no right to sell them. I wanted to see how strong the market was going to be. There was no market at that time. This was before the season in July. If Mr. Horst had made me a fair proposition I would have taken it up with Mr. Pabst and see what he wanted to do about it. I should judge the price at that time [294] was about 23 or 24 cents. They did not drop from that price. I am not familiar with choice hops or prime hops. They run below our grade. The Sweeney hops ranged in price from 22 to 23 cents. Choice hops

kept that price all during the year. Hops like the Sweeney hops never drop. They were prime to choice. When I made out orders for the purchase of hops, I make them in triplicate. The duplicate goes out. The triplicate is kept with mine for my own office. We bought some 1911 hops from Horst. They were good hops, satisfactory in every way, all but dirty picking.

Q. If 1912 hops had been as good as 1911 hops, would you have accepted them?

A. No, sir, because they were inferior grade.

Q. Why did you accept the 1911 hops when you would not accept *there?*

A. Because the samples submitted us were very much better than any of these samples submitted here. The 1911 hops had qualifications of choice, hops, with the exception of the dirty picking, which we allowed to go in.

Q. Why did you accept the 1911 hops, then?

A. We were very short of hops, and after inspecting them I found they were dirty pick and I took the matter up with Colonel Pabst, and he said, "Let it slip through." When we are short of hops we need hops. I would have rejected them in 1911. It was my intention to reject them, but Colonel Pabst being ahead of me, on his wish I accepted them. I have seen a perfect hop commercially in Milwaukee. The Saazer hop. That is an imported hop. I have seen the fancy United States hop. It is better than choice. They are practically perfect. Not entirely free of leaves, but contains a very small

(Deposition of Charles Zaumeyer.)

amount of leaves. A choice hop is a hop of sound quality picked properly, cured properly, uniform in color, well filled with lupulin and of fine flavor. There is no variation. They must be uniform in color. A hop of a season's pick comes up to a certain [295] standard and a choice hop is always absolutely up to the same standard. A choice hop has got to be a choice hop at any time of the year, and is the same in California as in any other State. I consider the same thing in reference to Mr. Horst's pick. I claim that what Mr. Horst calls a choice hop has a dirty pick.

Redirect Examination by Mr. POWERS.

The qualifications of the 1911 crop were good flavor, properly cured and they were well filled with lupulin. The only thing that was lacking was the clean picking. A choice California hop would be the same as a choice Yakima. If you compare a prime Washington with a choice Yakima why the prime Washington would be under grade. If I had 2000 bales of choice air-dried Cosumnes hops, I could have kept them over 1912, to use in the following season, if we did not use them all. We generally carry over 500 or 600 bales into the next season. When I examined these samples in the courtroom to-day, I had to admit that these samples were small and were not in the proper light. We generally examine samples in the morning, because that is the best time to look at the sample. You have got to have bright light. These samples here are undersized from the usual samples.

(Deposition of Charles Zaumeyer.)

Mr. POWERS.—We offer in evidence letter dated September 28th, 1912.

Letter dated September 28th, 1912, already in evidence, was then read.

Cross-examination—Mr. DEVLIN.

In our cold-storage room we do not have artificial light; we have regular light. We have electricity there, but not while we are inspecting samples. There are windows in the cold-storage rooms. **[296]**

Mr. ZAUMEYER, recalled by defendant .

With reference to the 1912 Cosumnes hops that were offered to us, if they had been of the same character so far as the hops themselves were concerned, as the 1911 hops were, and cleanly picked, we would have accepted them. Two thousand bales of hops is about the quantity we usually buy. It is a large order. We bought some Cosumnes hops in the year 1911 from Nebius Drescher & Co., about 250 bales, on a contract. Starting with the year 1911, we had to take those whether we bought the Horst hops or not. Sample 36 sent us was too small in the first place. Not a commercial sized sample. It was too small a sample. I did not examine it. Sample 25 was not a choice hop. Not as good as 24. The samples submitted by Mr. Horst varied. Some were better than others.

[Testimony of G. S. Chalmers, for Defendant (Recalled).]

G. S. CHALMERS, recalled by defendant.

Direct Examination by Mr. BUTLER.

I do not know the name of the man who was in

(Deposition of G. S. Chalmers.)

charge of plaintiff's ranch, known as the Murphy ranch, with whom I had a conversation. He was in charge of the picking machine. All I know about the man is that he told me he was in charge. There must have been fifty men working there, and the particular person we had the conversation with was in charge of the picking machine. I asked for Mr. Conrad and he said he was on another ranch and that he had charge of the picking machine at the time. He also said he would show me around. We walked along looking at the machine and to where the hops were going out of the elevator into the kiln. I do not think I could identify the man at the present time if I saw him. He was a large man. It was my first time on the ranch. He was working actively. At times he was. He had a long stick there and at times he would hit on the machine, and he gave orders to some Hindoos around there. [297]

The COURT.—The witness will not be permitted to testify further unless you can show the man in authority.

Mr. BUTLER.—Where are your men, Mr. Devlin?

Mr. DEVLIN.—Right here.

Mr. BUTLER.—Do you recognize any of those men?

A. I know one man, that is all I know. There was one of the men there at the kiln, if I ain't mistaken. I cannot say whether the other men were at the picking machine or not. The man on the right, as near as I can remember. I cannot identify

the man who was there and with whom I had the conversation. Mr. Conrad was not there at the time. I could not say positively whether the other man was there or not. I could not say whether he was in charge or not. I took it for granted that he had something to do with it or he would not have taken that privilege.

Q. Will you now state, Mr. Chalmers, what conversation you had with this party that you met there apparently in charge of the hop-picking plant at that time?

Mr. DEVLIN.—I object to it unless he can show somebody in authority, irrelevant, incompetent and immaterial, vague, indefinite and uncertain. We have tried to bring in everybody in charge of the machine.

Mr. BUTLER.—Was there any other person on the premises at that time exercising any authority in the picking house that you saw?

A. I never seen any.

Mr. BUTLER.—State what conversation occurred:

The COURT.—Be careful, Mr. Chalmers, to confine yourself strictly to what you know. Do not draw upon your imagination.

A. I will just tell you what I seen, and that is all I know. I went through the picking machine where they were picking; I went along to where the picking machine was and I asked him why they were letting the leaves and stems go in there, and he said, we have got a cheap contract and we have orders to

(Deposition of G. S. Chalmers.)

let [298] everything go in.

Q. What was the condition that you observed concerning the leaves and stems going in, that lead up to this conversation?

A. Well, the thing that throws the hops out was not working at all. It was standing still, and that is how we came to talk about it. Then we went along to the elevator that takes the hops up into the kiln.

The COURT.—The leaves and stems were ground up and sent to the kiln?

A. The picking machine strips them right off, and the leaves and stems were going up into the kiln. You could not see many hops. There were no leaves or stems being thrown out by the machine at all, that I saw. What we call the drum was standing still. It was not running. The vines are pulled right through lengthwise and no leaves and stems are stripped off the best they can. What did not pull off they had a man outside picking them off, and they left the rest on, and a little stems, leaves and so forth went in with the hops. The biggest stems were not sent up with the hops. They did not grind the vines up. The man said that they had orders to let everything go up in the kiln. That they had a cheap contract and the blower was stopped.

The COURT.—All of this will have to go out. The witness has shown that he does not know anything about it.

Mr. BUTLER.—How far is the hop ranch that you visited from your place, Mr. Chalmers?

(Deposition of G. S. Chalmers.)

A. I should judge about eight miles. It may be a little further. It is higher.

Q. Do you know about the relative time that hops usually ripen?

The COURT.—I cannot permit you to go into that.

Mr. BUTLER.—Exception. That is all.

A. I could not tell you who the man was I talked to. I had [299] never seen him before nor since. I could not say whether he was any of the gentlemen here in the courtroom. I will not say it was not. I was there two hours or two hours and a half. I went around from one building to another looking at the hops. That was the first time I had ever seen a picking machine. I had seen a lot of hop buildings before. I wanted to see how the hops were cured and the way the picking machine worked. I had never been on the ranch before. Mr. Traganza asked me to take a ride over and see the picking machine.

The COURT.—This evidence should not be permitted to stand. It is absolutely indefinite.

Mr. DEVLIN.—It is stricken out, your Honor.

The COURT.—Yes.

Mr. BUTLER.—Exception.

Exception #

Mr. POWERS.—Your Honor has stricken out the conversation. How about the witness seeing the physical fact of the leaves going in?

The COURT.—I am striking out the whole of it. There is nothing to connect it with the plaintiff.

(Deposition of T. A. Farrell.)

Mr. POWERS.—Exception.

Exception #

Mr. BUTLER.—We offer to prove by Mr. Traganza the same facts concerning the picking conditions that have been testified to by this witness.

The COURT.—I make the same ruling. Exception.

Exception #

[Testimony of T. A. Farrell, for Defendant (Recalled).]

T. A. FARRELL, recalled by defendant.

I have examined the entries in the sales book of the plaintiff on file here, and have checked up the sales of Cosumnes hops for the year 1912, and added up the number of bales that are shown in this book as having been sold on dates prior to November 4th, 1912. They amount to 2764 bales. **[300]**

[Testimony of E. Clemens Horst, for Plaintiff (Recalled).]

E. CLEMENS HORST, recalled by plaintiff.

Mr. DEVLIN.—(Q.) In your testimony I asked you certain questions as to your ability to deliver 2,000 bales of hops equal to the samples 1 to 20. I now ask you if, on November 4th, 1912, you had 2,000 bales of hops on hand equal in quality to samples 21 to 24?

Mr. POWERS.—We object to that as not rebuttal.

The COURT.—Objection overruled. Exception.

Exception #

A. Yes.

Q. Were you ready and willing on that day to

(Deposition of E. Clemens Horst.)

deliver them if they had been accepted?

Mr. POWERS.—I object to all of this on the ground that it is irrelevant, incompetent and immaterial, and calling for the conclusion of the witness on a question of law.

The COURT.—Objection overruled and exception.

Exception #

Q. On that date, if the defendant was willing to accept were you able, ready and willing to deliver the 2,000 bales of hops equal in quality to samples 21, 22, 23 and 24?

Mr. POWERS.—I object to that on the same ground.

The COURT.—Objection overruled.

Mr. POWERS.—Exception.

Exception #

A. Yes.

Mr. POWERS.—Where was these hops?

A. They were in that 3042 bales, an account of which we have given to you.

Q. These same air-dried Cosumnes hops you have already testified to?

Mr. DEVLIN.—That is our case, your Honor.

The COURT.—That closes the evidence. [301]

During the argument Mr. Powers referred to the testimony of witness Chalmers with reference to the green condition on which plaintiff's hops were picked in 1912.

Thereupon Mr. Devlin interrupted as follows:

That testimony was stricken out. Counsel is now

(Deposition of E. Clemens Horst.)

referring to testimony that your Honor has stricken out.

Mr. POWERS.—Mr. Chalmers testified yesterday with reference to the fact that the hops were picked twenty days earlier. That has not been stricken out.

The COURT.—All of his testimony went out.

Mr. POWERS.—Including that about the picking?

The COURT.—Yes, it was wholly irrelevant. The question is: What was the quality of these hops when they were tendered to the defendant?

Mr. POWERS.—Exception.

After the completion of the arguments of counsel, the Court gave the following charge to the Jury, viz.:

[Instructions of the Court to the Jury.]

The COURT. (Orally).—Gentlemen of the Jury, I ask your attention at this time for a few moments while I submit to you the principles of law that must govern you in your consideration of the evidence in this case for the purpose of arriving at a verdict. The action is one for the alleged breach of a contract for the sale of hops. While the cause has consumed some considerable period of time and has involved the taking of a large volume of evidence, I think that you will find when you come to consider it in the light of the instructions of the Court that it lies within rather narrow lines, and that you will have no difficulty in readily perceiving what the salient features of the case are that will call for your consideration. The Court will tell you what the

legal effect of [302] the correspondence between the parties is, and from that and the oral evidence that has been placed before you you will determine what the facts are which I shall indicate to you it is essential for you to find in order to reach a verdict; and with that view I shall now state to you the more specific principles that will actuate you in your consideration of the evidence.

The telegraphic offers by the plaintiff and their acceptance by the defendant in August, 1911, as shown by the evidence, constituted in law a valid and binding contract as of that date, whereby the plaintiff obligated itself to sell and deliver and the defendant to accept and pay for two thousand bales of choice, air-dried Cosumnes hops of the crop of 1912, at the price of twenty cents a pound delivered on board the cars at Milwaukee, Wisconsin, plus freight, that is, freight to be paid by defendant in addition to the purchase price named; and this contract was in no respect modified or changed by the subsequent correspondence or negotiations of the parties. While this contract did not, by its terms, require plaintiff to submit samples of hops prior to delivery, the evidence shows without conflict that the parties by their acts so construed it, and it thereby became one of the terms of the contract by which they were bound.

Under this contract, therefore, it was the duty of the plaintiff within a reasonable time after the harvesting of the crop of 1912 to submit to the defendant samples of hops of the quality specified in the contract and hold himself ready to deliver the quan-

tity called for by the contract in due course; and it was the reciprocal duty of the defendant upon receipt of such samples, if of the quality specified, to accept delivery of the quantity named in the contract and pay for them in accordance with its terms.

The evidence shows without controversy that plaintiff did in due time upon the harvesting of the crop of 1912 submit to the [303] defendant samples of hops of that season's growth which he claimed and still claims represented hops of the character in all respects as called for by the contract, and represented himself as ready to deliver the quantity therein specified to the defendant. The samples thus submitted were each and all rejected by the defendant as not representing the quality which it was entitled to demand under the contract, and thereafter, on November 4, 1912, defendant notified plaintiff by a telegram that it cancelled the contract, and refused to accept delivery of the hops tendered by plaintiff as not being of the grade or quality called for.

The first question, therefore, which you are called upon to determine in reaching a verdict is whether the samples thus submitted by plaintiff were of hops of the quality specified in the contract, since this is a question for the jury to determine and not one for the final decision of the defendant. If they were of that quality, and plaintiff was ready and able to deliver the quantity called for in accordance with the terms of the contract, the defendant could not arbitrarily repudiate the contract by claiming that the samples were not in accordance with the quality

of hops stipulated. If, however, none of the samples submitted by plaintiff represented the character of hops called for by the contract, but were of an inferior grade, and plaintiff was unable to furnish samples of the required quality within the time given for delivery, then the defendant had a right to reject them and to say that it would not receive hops of that character. To be more specific, if of the first lot of samples shown to have been submitted by plaintiff to defendant there were some that answered to the contract quality, it was the duty of the defendant to accept such samples as represented the required quality and give the plaintiff an opportunity to make delivery of the hops contracted [304] for in accordance therewith; and in such case the defendant, by rejecting them all and refusing to receive the delivery, was in default and guilty of a breach of the contract. And although none of the twenty samples first submitted were of the contract quality, nevertheless if those subsequently submitted by the plaintiff, or some of them, were of the contract quality, it was likewise the duty of the defendant to have accepted such as were of that quality, and to have given the plaintiff the opportunity to deliver hops equal in quality to such samples; and if in such case the defendant rejected them all without giving plaintiff the opportunity to deliver hops equal in quality to those that were up to the contract, then the defendant was in default and guilty of a breach. Again, if you find that both lots of samples submitted failed to come up to the contract quality, but find that under the

contract the plaintiff had time after November 4, 1912, in which to make delivery, the defendant could not, by attempting to cancel the contract on that date, lawfully preclude the plaintiff from thereafter delivering hops of the contract quality within the time given for such delivery.

Some question has been made by the defendant in its evidence as to the sufficiency in number and size of the samples submitted by the plaintiff to fairly enable the quality of the hops to be properly passed on. In that regard, as it does not appear that the defendant ever made any objection to the plaintiff on that score, and the latter was left to assume that the samples sent were sufficient in number and size for the purpose for which they were sent, it is now too late for defendant to take advantage of that objection, even if well founded.

Where the article sold is in its nature not entirely uniform in quality, a sample represents the character of a larger mass only approximately, and if the jury find that hops are in their nature not of an entirely uniform quality, and also find that as a matter **[305]** of custom in the hop trade a sample is regarded as representing the average quality of an entire lot, then the defendant has his full rights if he obtains or may obtain in the entire quantity to be delivered the aggregate or average of quality indicated by the sample. The fact that a number of samples was submitted does not necessarily imply an understanding that each bale of hops shall be equal to the same sample, or that a comparison is to be made separately with each bale of hops. What

is a proper mode of applying the standard of quality is a question of fact which you are to decide from all the evidence in the case.

From what I have said you will understand that if the samples submitted by plaintiff did, as indicated, fairly represent the quality of hops called for in the contract, and that plaintiff was ready and able to deliver the required quantity within the time allowed him for the purpose, then defendant was not justified in attempting to cancel or repudiate its obligation to receive them, and the plaintiff will be entitled to recover the damages suffered by it through defendant's refusal to accept and pay for them. And whether plaintiff had the full quantity on hand or not would make no differenec in that respect if he could have procured them in time to make delivery within the terms of the contract; and with reference to the time within which such delivery was to be made, I shall hereafter more fully instruct you.

If at the time of the receipt of defendant's telegram announcing that it cancelled the contract, plaintiff was ready and able, as I have indicated, to comply with its terms, he was entitled to treat this refusal as a complete breach which gave him the right, without further tender, to immediately commence an action for damages. The rule of damages for a breach of contract by a renunciation of it before the day of performance arrives is the amount that [306] the injured party suffers by the continued breach down to the time performance is due, less and abatement by reason of steps by the injured party to protect himself which the law requires him

to take. That is, if you find that the defendant was not justified in refusing to accept the hops in question, the plaintiff is entitled to such damages as will justly represent the amount of its loss between the date of the repudiation of the contract and the time at which it had to make complete delivery of the hops, less the amount he could save by a reasonably prompt disposition of the hops to others at the best price to be obtained, as hereinafter stated, such damages not to exceed the amount demanded in the complaint—which, I believe, is $32,000.

Where a contract is made, as in the present instance, for the future delivery of a commodity not yet grown or produced, and no time is specified for delivery, the law implies ordinarily that delivery shall be made within a reasonable time after the commodity has been prepared for market. In this case, however, evidence has been introduced tending to show that where in the sale of hops of a crop to be grown no precise time is specified for delivery, it is understood by those dealing in the commodity that the seller or shipper has until the end of the shipping season in which to make delivery, and that this season extends from the time of picking or harvesting to the first of March of the following year. If you find that such a custom or trade usage existed and was known to the parties when the contract was made, then, the contract being silent as to the date of delivery, plaintiff had until the end of such shipping season to deliver the hops specified in the contract. If the hops tendered by plaintiff were of the quality specified in the contract and de-

fendant consequently not justified in refusing their delivery, plaintiff was not required to make further tender of them, but if it had such hops on hand it could proceed to [307] sell them at the best market price obtainable at the time and place of delivery; if there was no market price at the time and place of delivery then at the market price at the nearest market for such commodity, or if there was no existing market price then at the best price obtainable; and if this was less than the contract price plaintiff is entitled to recover the difference between that price and the amount realized by the sale, plus any expenses reasonably incurred by plaintiff in excess of what it would have cost plaintiff to deliver the hops to defendant had the contract been completely performed. It is for the jury to decide what expenses, if any, thus claimed are, under the circumstances, justly and reasonably incurred. While in this case, as I have indicated, plaintiff was required, under the law, upon a repudiation of the contract by the defendant, to proceed with due diligence and expedition to dispose of the hops to the best advantage it could and thus reduce the damages resulting through defendant's breach. If you find there was a breach, he was only entitled to incur such expense in that regard as an ordinarily prudent man would have incurred, such as for brokerage, insurance, storage, cartage, and the like incidents. The mere fact that plaintiff may have paid out certain expenses in reselling the hops is not in itself sufficient to entitle him to recover the expenditure against the defendant unless the

jury find that it was a reasonably just and proper one which a man of ordinary business prudence would have considered necessary to incur for the purpose.

In this connection, evidence has been introduced tending to show that the plaintiff after it received notice from the defendant that the latter cancelled the contract began to sell the hops to others. If you find that at the time of the giving of such notice by the defendant to the plaintiff the plaintiff had a [308] sufficient quantity of hops on hand of the quality required by the contract to fill it, and after such notice began to sell such hops to others in the usual and ordinary manner in which hops are sold, and endeavored to obtain the best prices possible, you have a right to consider the prices obtained by the plaintiff on such resales in connection with the evidence as tending to establish the market prices of such hops at the time of such resales. If a contract for the sale of merchandise has been broken by the buyer, and the seller is compelled to resell at a loss, he is entitled to recover the difference between the contract price and the price that he has realized on a resale, together with his expenses, exclusive of interest, interest on this demand not being claimed.

If the time for delivery extends over a period of time, then for the purpose of fixing damages the market value to be considered is that of the last day of the period within which delivery may be made under the contract.

Should you find that the defendant committed a breach of the contract as alleged, but that at the

time the plaintiff did not have the full quantity of hops required to fulfill the contract in his possession or under his control, and thereby was not put to the expense of making a resale of the entire quantity called for by the contract, then the only damages which the plaintiff could recover as to the quantity not on hand would be the loss of profit which it would have made had the defendant completed the contract; and that profit would be the difference between the price at which the plaintiff could then have procured the hops required to fill the contract and the price at which they were contracted to be sold.

Those comprise the specific features of the charge with reference to the claim of the plaintiff.

As to defendant's counterclaim, I advise you, gentlemen of **[309]** the jury, that there is no sufficient basis in the evidence upon which to rest a verdict for defendant on that demand.

There are certain general considerations which it is proper for me to submit to you.

As I indicated to you at the opening, the law of the case is to be given to you by the Court, and you are bound by that, and bound to apply it to the evidence in the case in reaching your verdict. The facts, however, rest solely and exclusively within the province of the jury to find, and with that the Court is neither disposed nor permitted to in any wise interfere. We are permitted, within the jurisdiction that this Court exerts, to discuss the evidence with the jury if we see fit, but we are not much in the habit of doing so, because our observation of the in-

telligence of the class of jurors that we get in the federal courts is such that we do not find it necessary, and it is our habit usually to leave the consideration of the evidence free from any suggestion by the Court as to its views.

The plaintiff is bound always in a case to sustain the burden of proof upon the affirmative issues that arise out of the pleadings and involving his demand, and in order to recover he must sustain that by what is termed in the law a predonderance of the evidence. Now a preponderance of the evidence simply means that **[310]** in the judgment of the jury, because they are the tribunal which passes upon that, the evidence on behalf of the plaintiff is in some respects stronger or more persuasive as a basis of their verdict than that presented on behalf of the defendant. It does not mean that the plaintiff is bound to present a greater number of witnesses than the defendant in favor of his claim, because preponderance does not necessarily depend upon the greater number of witnesses. One or two witnesses, or a document or a presumption, may be of such effect by reason of its relation to the other facts in the case as to satisfy the jury that the truth lies in favor of that side, although a much larger number of witnesses may testify directly and positively to the contrary. So that you see your verdict will rest upon what you deem to be the strength of the evidence, independently of the number of witnesses on either side. You are not, however, to judge of the evidence of the witnesses arbitrarily, but your judgment in that respect is to be exercised with legal dis-

cretion and in subordination to the rules of evidence.

In this case, Gentlemen of the Jury, a very considerable portion of the evidence consists of what is termed, or has been here termed, expert testimony, Now, it is proper, or it would not be admitted, but your are to understand, Gentlemen of the Jury, that your good judgment, any more than mine, is not to be swerved from its pedestal by considerations that may be suggested from the witness-stand by so-called experts if they do not accord with your reason, based upon all the evidence in the case. The observation of courts in dealing with expert testimony is that almost invariably an expert being produced by one side or another seems unconsciously to deem it his duty to make out a case for the side by which he has been produced. Now, that is not in any wise reflecting upon the character of experts,—it is human nature— [311] but it is something that the jury may take into consideration in determining the value that they will ascribe to expert testimony in any case; and in this case you will have a right to apply it in determining the degree of weight or credibility,—because I assume that all the witnesses who have appeared before you are men of credibility,—that you will attach to that class of evidence.

So with reference to the testimony of any witness in the case, whether expert or other, you pass upon his credibility, and you do that by observing his demeanor and manner upon the stand and his apparent bias or prejudice or interest in the case, whether a pecuniary interest or a friendly one, whether an

enmity which grows out of relations with the party or through the circumstance of being a rival in trade,—all those considerations you have a right to take into your judgment in determining the credibility that you will accord to any witness.

A witness is presumed by the law to tell the truth, and the jury, in the absence of anything to indicate that a witness has deviated from the truth, must give him the benefit of that presumption; but that does not mean, of course, that you are to abdicate your reason and judgment in passing upon the credibility of a witness, or that you are bound to believe him, no matter how strongly or positively he may assert a fact, if it is one which does not under all the circumstances accord with your judgment. It is in accordance with these principles that you pass upon the credibility of the witnesses and solve, according to your best judgment, the conflicts that have appeared in various particulars in the testimony in the case; and in this way you make up your minds as to what the facts are.

In this case, as I have perhaps sufficiently indicated to you, the crucial and pivotal question is as to the character of these [312] hops. If the hops which were tendered by the plaintiff were of a character such as would be regarded in the trade as coming substantially within the quality specified in the contract in suit, then the plaintiff is entitled to have that contract enforced by an award of such damages as you may find, within the principles I have stated, he has suffered. If, on the other hand, the hops, in your judgment, did not comply with the require-

ments of that contract as to their quality, then he is not entitled to recover, but your verdict in such event would be in favor of the defendant, which would carry defendant's costs.

In the federal courts, gentlemen of the jury, unlike the State system, the verdict of the jury is required to be unanimous. You cannot find a verdict by a less number than the entire twelve, as you may under the present State law.

The clerk has prepared forms of verdict which you will find to meet your necessities in view of the suggestions I have made to you. There is a form here which will enable you by filling in the amount to express your verdict if you determine in favor of the plaintiff. Should your verdict be in favor of the defendant, there is a form which will express that conclusion.

Thereupon and before the jury retired Mr. Powers excepted to those portions of the instructions given by the Judge in the presence of the jury, which are specifically as follows:

The COURT.—(After instructing the jury.) Are counsel desirous of taking any exceptions?

Mr. DEVLIN.—On the part of the plaintiff we are satisfied with the instructions.

Mr. POWERS.—I want to object to that portion with refernce to there being no evidence to substantiate the cross-complaint. I want to except to that, and also to that portion charging that the contract was closed by the telegram, and was not modified by the subsequent correspondence. [313]

The COURT.—With reference to the counter-

claim, Mr. Powers, there was evidence introduced upon the question which simply left it to the jury to go into the field of conjecture, as to what your damages were if they should find in your favor, therefore, it did not afford a sufficient basis to give them an amount to pass upon. You may retire, Gentlemen of the Jury.

Mr. POWERS.—In regard to proposed instructions, are they deemed excepted to?

The COURT.—Exceptions should be taken in the presence of the jury, so that the Court may have an opportunity of correcting the instructions before the jury retires.

Mr. POWERS.—I want to object to the refusal to give No. 3, that is all.

Said requested instruction #3 read as follows:

"It is admitted that on October 15th, 1912, the plaintiff sent to the defendant a night lettergram signed E. Clemens Horst Co., of that date, which has been introduced in evidence; that the defendant replied to it by the telegram, signed Pabst Brewg. Co., dated Oct. 21st, 1912, which has been introduced in evidence; that the plainitff replied to the last mentioned telegram by the letter of Oct. 24th, 1912, signed E. Clemens Horst Co., which has been introduced in evidence. That on Oct. 18th, 1912, the plaintiff wrote to the defendant a letter signed E. Clemens Horst Co., which has been introduced in evidence; that the defendant replied to the last mentioned letter by letter dated Oct. 23, 1912, signed Pabst Brewing Co., which has been received in evidence and that the defendant replied to the last

mentioned letter by letter dated Oct. 29th, 1912, signed E. Clemens Horst Co., C. E. Horst, which has been received in evidence;

I instruct you that any contract which was entered into between the plaintiff and defendant before the exchange of these [314] telegrams between October 15th, 1912, and October 29th, 1912, was modified by the last mentioned correspondence. So that even if there was prior to October 15th, 1912, any contract between the plaintiff and the defendant by which plaintiff was to sell and the defendant was to purchase two thousand bales of hops at the price of twenty cents a pound, plus freight at Milwaukee, or F. O. B. Pacific Coast, yet from and after this correspondence of October, 1912, it became the duty of the plaintiff if it would fulfill its contract to sell and deliver to the defendant two thousand bales of hops equal to the four samples of hops which the defendant had theretofore sent to the plaintiff and it also became the duty of the plaintiff, if it would fulfill its contract to furnish to the plaintiff before shipping or delivering to the defendant any of the said two thousand bales of hops to furnish to the defendant samples of the hops which it proposed to ship, which samples were required to be equal to the said four samples sent by the defendant to the plaintiff and it was the plaintiff's duty to furnish these samples within a reasonable time after October 21st, 1912, and if you find that the plaintiff did furnish to the defendant the samples of the hops number 25 to 38 mentioned in the said letter of October 29th, 1912, but that the last mentioned samples

were not equal in quality to the four samples sent by the defendant to the plaintiff as aforesaid, or if you find that the plaintiff did not within a reasonable time after October 21st, 1912, furnish to the defendant samples of hops equal in quality to the said four samples sent by the defendant to plaintiff then and in either of those events your verdict should be for the defendant."

The COURT.—Very well.

Thereupon the jury retired to deliberate and thereafter returned to the Court a verdict in favor of plaintiff.

WHEREUPON and thereafter and on the 29th day of April, 1914, judgment was rendered and entered upon said verdict in favor of [315] the plaintiff and against the defendant for $22,625.30.

Stipulation Re Settlement of Bill of Exceptions.

The settlement of the foregoing bill of exceptions having been regularly continued until the present term of court, it is hereby stipulated and agreed that said bill of exceptions may be presented to the judge who tried the above-entitled case and settled, certified and allowed.

DEVLIN & DEVLIN,
W. H. CARLIN,
Attorneys for Plaintiff.
HELLER, POWERS & EHRMAN,
Attorneys for Defendant.

Order Settling Bill of Exceptions.

The settlement of the foregoing Bill of Exceptions having been regularly continued to the present term

of Court, and said Bill of Exceptions being now presented in due time and found to be correct, the same is hereby certified and allowed as a true Bill of Exceptions, taken upon the trial of the above-entitled action.

Dated: June 8th, 1915.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Jun. 8, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [316]

United States Circuit Court of Appeals, for the Ninth Circuit.

E. CLEMENS HORST COMPANY (a Corporation),

Plaintiff,

vs.

PABST BREWING COMPANY (a Corporation),

Defendant.

Petition for Writ of Error.

The Pabst Brewing Company, a corporation, defendant in the above-entitled action, feeling itself aggrieved by the verdict of the jury and the judgment thereupon entered in favor of said plaintiff, on the 29th day of April, 1914, whereby it was adjudged that the plaintiff recover of and from the defendant the sum of Twenty-two Thousand Six Hundred Twenty-five and 30/100 (22,265.30) Dollars, and its costs, taxed at the sum of Two Hundred Fifty-two and 80/100 (252.80) Dollars, comes now, by Heller, Powers & Ehrman, its attorneys and petitions the

above-entitled court for an order allowing it, said defendant, to prosecute a writ of error to the Honorable United States Circuit Court, in and for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals in and for the Ninth Circuit, and herewith defendant presents its assignment of errors.

And your petitioner will ever pray.

PABST BREWING COMPANY, a Corporation,

By HELLER, POWERS & EHRMAN,

Its Attorneys. [317]

By A. DAVIDSON, Its Agent,

HELLER, POWERS & EHRMAN,

Attorneys for Defendant in Lower Court,

Plaintiff in Error.

[Endorsed]: Filed Feb. 4, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [318]

United States Circuit Court of Appeals, for the Ninth Circuit.

E. CLEMENS HORST COMPANY (a Corporation),

Plaintiff,

vs.

PABST BREWING COMPANY (a Corporation),

Defendant.

Assignment of Errors.

Now comes the Pabst Brewing Company, a corporation, defendant in the above-entitled action by Heller, Powers & Ehrman, its attorneys, and files the following as the errors upon which it will rely upon its prosecution of the writ of error in the above-entitled cause.

AS TO INSTRUCTIONS TO JURY.

The Court erred in giving the following instructions to the jury which were excepted to on specific grounds by defendant in the presence of the jury and before it left the courtroom to deliberate, which are hereinafter specified, viz:

1st. The portion thereof in the following words:

The telegraphic offers by the plaintiff and their acceptance by the defendant in August, 1911, as shown by the evidence, constituted in law a valid and binding contract as of that date, whereby the plaintiff obligated itself to sell and deliver and the defendant to accept and pay for two thousand bales of choice air-dried Cosumnes hops of the crop of 1912, at the price of twenty cents a pound delivered on

board the cars at Milwaukee, Wisconsin, plus freight, that is, freight to be paid by defendant in addition to the purchase price named; and this contract was in no respect modified or changed by the subsequent correspondence [319] or negotiations of the parties. While this contract did not by its terms require plaintiff to submit samples of hops prior to delivery, the evidence shows without conflict that the parties by their acts so construed it, and it thereby became one of the terms of the contract by which they were bound, because the said contract of the original telegrams was subsequently modified by the letters and telegrams between the parties so that the sale became one of hops equal to samples 21 to 24 submitted by defendant to plaintiff.

2d. That portion in the following words, viz:

As to defendant's counterclaim, I advise you, Gentlemen of the Jury, that there is no sufficient basis in the evidence upon which to rest a verdict for defendant on that demand, because the evidence showed that defendant was compelled to buy certain hops to complete its brewing operations, because it had relied on obtaining the hops under plaintiff's contract of choice character and the actual number of pounds bought and prices paid therefor were in evidence and it was for the jury to decide whether or not they were a proper claim against plaintiff.

3d. The Court erred in refusing to give the following instruction requested by defendant, reading as follows:

"It is admitted that on October 15th, 1912, the plaintiff sent to the defendant a night lettergram

signed E. Clemens Horst Co., of that date, which has been introduced in evidence; that the defendant replied to it by the telegrams, signed Pabst Brewg. Co. dated Oct. 21st, 1912, which has been introduced in evidence; that the plaintiff replied to the last mentioned telegram by the letter of Oct. 24th, 1912, signed E. Clemens Horst Co., which has been introduced in evidence. That on Oct. 18th, 1912, [320] plaintiff wrote to the defendant a letter signed E. Clemens Horst Co., which has been introduced in evidence; that the defendant replied to the last mentioned letter by letter dated Oct. 23d, 1912, signed Pabst Brewing Co., which has been received in evidence and that the defendant replied to the last mentioned letter by letter dated Oct. 29th, 1912, signed E. Clemens Horst Co., *C. E.* Horst, which has been received in evidence;

I instruct you that any contract which was entered into between the plaintiff the defendant before the exchange of these telegrams between October 15th, 1912, and October 29th, 1912, was modified by the last mentioned correspondence. So that even if there was prior to October 15th, 1912, any contract between the plaintiff and the defendant by which the plaintiff was to sell and the defendant was to purchase two thousand bales of hops at the price of twenty cents a pound, plus freight at Milwaukee, or F. O. B. Pacific Coast, yet from and after this correspondence of October, 1912, it became the duty of the plaintiff if it would fulfill its contract to sell and delivered to the defendant two thousand bales of hops equal to the four samples of hops which the defend-

ant had theretofore sent to the plaintiff and it also became the duty of the plaintiff, if it would fulfill its contract to furnish to the plaintiff before shipping or delivering to the defendant any of the said two thousand bales of hops to furnish to the defendant samples of the hops which it proposed to ship, which samples were required to be equal to the said four samples sent by the defendant to the plaintiff, and it was the plaintiff's duty to furnish these samples within a reasonable time after October 21st, 1912, and if you find that the plaintiff did furnish to the defendant the samples of the hops, numbers 25 to 38 mentioned in the [321] said letter of October 29th, 1912, but that the last mentioned samples were not equal in quality to the four samples sent by the defendant to the plaintiff as aforesaid, or if you find that the plaintiff did not within a reasonable time after October 21st, 1912, furnish to the defendant samples of hops equal in quality to the said four samples sent by the defendant to plaintiff, then and in either of those events your verdict should be for the defendant.''

Errors in Law.

The Court erred in each instance in overruling defendant's objections to the following questions which rulings were excepted to by defendant because the same were and each was irrelevant and immaterial, and because several of them were improper on the additional ground set after the several respective questions, as follows, viz.:

Questions asked witness E. C. HORST:

1. The question referring to plaintiff's method of

baling hops, viz.:

I will ask you whether or not that is the practice of hop-growers, or whether you did this yourself, and it is an exception to the rule (Exception #1), which question was answered in substance, as follows:

That the usual custom of hop-growers was to bale all hops together but that a certain 4,300 bales of hops of the plaintiff was baled differently.

2. Is there a practice or usuage among hop buyers and hop dealers as to the delivery of hops when no time is specified (Exception #2), which question was answered in substance as follows:

That the dealers had the right to ship the goods at any time up to the end of February or perhaps March of the following year.

3. If no time is specified in the contract for the delivery of hops and the hops are to be of a subsequent year's growth, is [322] there any practice or usuage whereby the seller will have to the end of the shipping season, or if not, what time is he to fulfill the contract for the delivery of those hops? (Exception #3) which question was answered in substance as follows:

That the seller had until the end of the shipping season to make his delivery.

4. Will you state whether or not the hops that you grew on your place in 1912 were or were not choice air-dried Cosumnes hops, which question was answered in substance as follows:

That the samples sent were choice air-dried Cosumnes hops and were from certain 4,300 bales referred to by the witness.

This was objectionable on the additional ground that the hops therein referred to were in no manner connected with the defendant or the cause of action in this case.

5. What did you do with these 2,000 bales of hops that you sold to the Pabst Brewing Company and that they refused to accept? (Exception #7) which question was answered in substance as follows:

That plaintiff sold 2,000 bales through its travelling men in the eastern States.

This was objectionable on the additional ground that it assumed that there was a certain specific 2,000 bales actually sold to the Pabst Brewing Company and that defendant actually refused to accept the same, when nowhere in the testimony is that fact established.

6. Q. How many pounds does a bale of hops contain? Which question was answered in substance as follows:

About 200 pounds.

7. Also the several questions asked witness Horst as to the amount of travelling expenses, insurance and brokerage from an examination of the entries in the books which were records of [323] expenditures by persons employed in New York and Chicago; which questions were answered in substance as follows:

That certain books kept by the bookkeeper in San Francisco showed entries made by local San Francisco clerks from reports from agents and representatives in the eastern States as to the amount re-

ceived for hops and travelling expenses, insurance, brokerage and the like, and included some 40 sales with the names of the purchasers and the prices paid.

Because the same were hearsay and also because the books were the best evidence.

8. State what in your opinion, was the reasonable price that you could have realized from the sale of 2,000 bales of air-dried choice Cosumnes hops, if sold in that quantity, in the month of February, 1913, at the nearest market. Which question was answered in substance as follows:

Eleven to twelve cents a pound.

This was objectionable on the additional ground that the contract was broken in the early part of November and sales in February, 1913, were not within a reasonable time thereafter and because it had not been proven that there was any 2,000 bales of choice air-dried Cosumnes hops in plaintiff's hands at that time available for the Pabst Brewing Company.

9. Then state whether an expert could form a fair and accurate opinion as to quality of hops of 1912, by the samples now in the courtroom in their present condition. Which question was answered in substance as follows:

That he could not because the samples were aged and had been mussed up.

This was objectionable on the additional ground that it calls for the conclusion of the witness of another's man's mind and argumentative. [324]

10. Would the samples have to be kept preserved

in order to give the Court and Jury a fair indication of what the hops were two years ago that those samples were supposed to represent. Which question was answered in substance as follows:

That the samples should be kept tightly wrapped and properly handled.

11. Please state what was the market price that could be obtained in the month of February, 1913, at the nearest market for that class of hops in February, 1913 (Exception #11), which question was answered in substance as follows:

Eleven to twelve cents a pound.

This was objectionable on the additional ground that February, 1913, was not a reasonable time after the breach of contract and that there was no definite 2,000 bales of hops identified concerning which the price could be made.

The Court erred in sustaining plaintiff's objections to the following questions:

12. Q. Asked Witness Horst: What steps, if any, did you take to set aside that 2,000 bales for the Pabst people on November 4th, 1912, when the defendant notified the plaintiff that they would not take the hops offered? I want to know whether plaintiff segregated any hops at that time for the Pabst people.

The substance of the testimony rejected was, that no steps whatsoever were taken by the plaintiff to segregate any 2,000 bales of hops for the Pabst people at that time nor at any time until after the sales were made and then plaintiff allotted so much of the sales of 4,300 bales all identical in character, as were

sold at a loss to the defendant (Exception #12).

13. Q. Asked: Did you when the Pabst people notified you they would not take these goods because of their quality, set aside or take any steps to set aside or to use any marks or any indications [325] that any portion of the 2,900 bales were set aside for the Pabst people?

The substance of the evidence rejected was as follows:

At that time the witness testified that he had 2,900 bales on hand, and the evidence rejected would have established the fact that none of these bales were in any way ear-marked as being property of the defendant, or being set aside for the defendant, but all of them were sold indiscriminately and such of them as were sold at a loss were claimed to be defendant's.

14. Q. Did you have any other hops on hand, save and except these 2,900 bales of your own Cosumnes raised hops with which to fill the contract that had been accepted?

The rejected testimony would have established the fact that there were no other hops on hand and the hops on hand were all of a character which did not comply with samples 25 to 38.

The Court erred in overruling defendant's objections to the following questions:

15. Q. Asked Witness Horst: How much do you estimate that the overhead expenses were increased by the fact that you had to sell through agents in Chicago this 1500 bales of so-called Pabst hops? (Exception #71) which question was an-

swered in substance as follows:

About $4,000 or $5,000. The only basis of the evidence was hearsay testimony of reports made by others; there was no specific 1500 bales in any way connected with the defendant.

16. Q. Asked Witness Conrad: What would you say as to the quality of the crop of 1912, the 4,300 bales, as to being choice hops or not? Which question was answered in substance as follows:

That they were choice.

The following questions asked Witness Lange:

17. Q. Have you made an examination of the books for the [326] purpose of ascertaining the price at which they (the hops of plaintiff) were sold and the persons to whom they were sold and what books did you have to examine to do that? The question was answered in substance as follows:

That he had examined the books of plaintiff to find out to whom defendant's hops were sold after November 4th, 1912, and that he figured out the average number of days and took the value of the hops and figured the insurance, interest and that he went through plaintiff's books and found the prices at which plaintiff had sold the 2,000 bales of defendant's hops to other parties after November 4th, 1912.

This being objectionable because there was no 2,000 bales set aside for defendant; the segregation did not take place until long after the sales were made; all of the entries in the books were made by other persons than Mr. Lange and the facts entered

were not known to the person making the entries. (Exception #35.)

18. What is the aggregate of the miscellaneous charges for the sale of the Pabst goods? Which question was answered in substance as follows:

That the witness had figured out that the overhead expenses of the business was $4,459.30, by taking the storage charges, local freight, sampling and other charges like that which he had vouchers to cover in the regular course of business, and that the items of these charges were made in the east and reported to the San Francisco office.

This was objectionable on the additional ground that it called for hearsay evidence as to what the charges were and a conclusion of law as to whether the charges were in any way connected with the 2,000 bales sold defendant. The expenses were made in the east and paid out by plaintiff's employees and the purposes [327] for which they were paid out could only be ascertained from the man who paid them out. Certain entries of other persons were made by the witness from statements made by some one else and they were necessarily hearsay, irrelevant and immaterial.

19. Q. Asked Mr. Lange: Did you figure any interest on losses? Which question was answered in substance as follows:

That the witness figured interest approximately on $2,300 difference in the price between the price sold to Pabst and the price sold to the other parties. Most of the sales made of the 1920 bales were sold on delivery prices at the town where the brewery was follows:

20. Please state what you put into the selling cost and how you arrived at it to be distributed to these 2,000 bales?

Which question was answered in substance as follows

That all of the agents and salesmen throughout the United States turned in expense slips to the San Francisco office, thereby showing the eastern expenses and the witness tabulated these expenses after he had left out such items as estimates for office force and the like. This was done between the dates of November 5th, 1912, and June 30th, 1913, which he considered to be the selling season for the 2,000 bales. (Exception #38.)

This was objectionable because the witness already testified that he knew nothing about any selling price except by hearsay, and whether any of these expenditures made were in any manner connected with Pabst goods, was necessarily hearsay, and the witness did not pretend to have any knowledge as to the reason for any expenditures nor price, nor the manner with which the expenditures were connected with the Pabst goods and the great bulk of the Pabst goods were sold long prior to June 30th, 1912, and many of these expenditures are for salaries incurred without any connection [328] whatsoever with the Pabst goods.

21. Beginning on November 4th, 1912, until you finished selling the remainder of the bales, about 1300 and some odd bales, were there certain expenses incurred in New York and Chicago and eastern States in selling the remainder of the 2,000 bales

of what we call the Pabst hops and other hops? Which question was answered in substance as follows:

That there were. That it appeared from the books of the company that the expenses referred to by him were incurred in New York and Chicago in selling 2,000 bales belonging to Pabst when in fact there were no 2,000 bales set aside for Pabst and the witness did not know anything about what the expenses were incurred for.

This was clearly based on hearsay testimony and there was nothing to indicate which 1300 bales out of the 2,000 bales on hand were Pabst goods and witness did not know of his own knowledge in what manner any expenses had been made for these particular goods.

22. And in lieu of a cent and a half a pound, you are simply giving here a proportion of the overhead charge in the New York office for selling these 1300 bales of hops. Is that correct? Which question was answered in substance as follows:

Yes.

23. A series of questions asked Witness Lange concerning his examination of the books and the vouchers and his application of storage charges, local freight, cost of calculation, discount and the like, which questions were answered in substance as follows:

That the books of the company showed that the eastern agents had made sales of some various lots of bales from 4,300 bales harvested that season all of the same character, and that [329] a short

time before the trial of the case Witness Lange had compiled the sale prices of some 1300 bales that had been sold at a loss and had estimated these various charges and had considered that these goods were Pabst goods and that the said expenses were incurred as necessary for the sale of the Pabst goods.

And also

Q. Explain the other items of overhead, such as bad accounts (Exception #36), which question was answered in substance as follows:

We invoiced the goods at a certain price. We had to collect them through collection agencies, and got a less price. In this case we have not been able to collect at all for them. We lost the money.

This is objectionable because none of these goods had been set aside as Pabst goods at the time the sales were made and the losses incurred.

And also the question referring to the salaries paid to the salesmen and the charges of the stock-room and the like, viz: "And they related to the 2,000 bales of hops and also to the other hops?" Which question was *answer in* substance as follows:

That he knew in the ordinary course of business that these charges related to the 2,000 bales of hops belonging to Pabst.

The testimony was necessarily hearsay.

24. Did you make any calculation as to the proportion of the expenses these 1,300 bales bore to the total expense, that you have just described? Which question was answered in substance as follows:

That he made these calculations from sales books in daily use and that it took him five or six days to

make the examination from books, the entries of which had been made by other parties and the items on which the entries were made were all transactions [330] which occurred in the eastern States and about which the bookkeeper making the entries knew nothing and the witness knew nothing.

On the ground that the same called for the conclusion of the witness on the question of law, namely, the proper method of apportioning expenses amongst various classes of hops on hand under varying conditions which were not before the jury and also was necessarily based on hearsay as to the services performed by various people connected with the sale of the Pabst goods, and was an attempt to put into the record evidence which should have been obtained from the employees who made the expenses, and knew why the services were performed, and what the expenses were.

25. Have you made correct estimates on the basis that you have given to the Court for your circulation? Which question was answered in the affirmative.

26. What do you say as to these samples being choice or otherwise? Which question was answered in substance as follows:

That the hops were choice.

Because the witness was not shown to be an expert.

27. Please state what your examination discloses to have been the price obtained from the resale of the 2,000 bales of hops that it is claimed was sold to the Pabst Company and refused to buy it?

Which question was answered in substance as follows:

That the 2,000 bales were resold at the average price of .1366 or $23,584.80.

This was objectionable on the additional ground that the answer must necessarily be based on hearsay evidence and on conclusion of law as to what was the proper method of apportioning the 2,000 bales and which 2,000 bales were to be used as basis of determining the price and presumes the existence of testimony showing the character, class and quality and condition of remaining [331] bales included in the computation which was not before the jury.

28. Will you state the result of the examination of the books of the plaintiff for the purpose of ascertaining what the books show was the loss that had been sustained by plaintiff measured on the assumption that the hops were sold to Pabst Company at 20 cents a pound and what plaintiff actually received for the hops, together with the cost of reselling them? The question being answered in substance as follows:

$32,651.73 plus several items that I have tabulated in accordance with my previous testimony. If we had charged a commission of 1½¢ instead of the overhead charges, the total loss of 4,000 pounds would be $34,192.43.

On the additional grounds stated in the last three questions.

29. The Court erred in allowing all questions concerning the entries in the books to Witness Lange.

With reference to the connection that the several expenses incurred during the months of November, December, January and February had to the 2,000 bales of Pabst goods, or to the defendant.

Because the answer elicited brought out the fact that the expenses were incurred in the general course of business; that there was no 2,000 bales specifically set forth to defendant and that all the items of the expenses were entirely hearsay and no witness had testified as to their correctness or their connection to defendant or goods belonging to defendant.

31. The Court erred in denying defendant's motion to strike out the answer of Witness Lange that the most of the sales made of the 1920 bales of the 2,000 bales sold other parties after November 4th, 1912, were sold on delivery prices, on the ground that it takes for granted the fact to be in evidence that there were 2,000 bales sold on account of the Pabst Company.

32. Q. Asked Paul E. Peterson: Look at the samples of the hops and state to the jury whether you consider them in your [332] opinion choice hops. Which question was answered in substance as follows:

That the samples were choice.

On the ground that the witness Peterson was not shown to be an expert. (Exception #21.)

33. Q. Asked Witness Conrad: What would you say as to the quality of the crop of 1912, the 4,300 bales, as to being choice hops or not? The question being answered in substance as follows:

That the said crop was choice.

On the further ground that the witness was not shown to be an expert.

34. Q. Asked Witness Marks: Suppose I should put 2,000 bales of rejected hops in your hands at the close of the season in November, 1912, that were rejected by a large brewery in the east, and you had to employ men in Milwaukee, New York and Chicago to sell some of them and you had to hire solicitors, would you only pay them one-half a cent a pound? The question was answered in substance as follows:

That the witness did not know what the charge would be, but it would be more than a half a cent a pound.

35. Q. Asked Witness Horst: On November 4th, 1912, if defendant was willing to accept, were you ready, able and willing to deliver the 2,000 bales of hops equal in quality to samples 21, 22, 23 and 24? Which question was answered in the affirmative.

It was calling for the conclusion of the witness on a question of law.

36. Q. Asked Witness Zepfel: State whether samples 1 to 20 were choice hops. Which question was answered in the affirmaitve.

Because the witness was not a quality hop expert. Because the witness was not shown to be an expert on the subject. [333]

37. To the question asked Witness Theodore Eder: What have you to say as to the quality of hops raised by Mr. Horst in the Cosumnes district in 1912, as being choice or otherwise? Which question was answered in the affirmative.

AS TO OBJECTIONS SUSTAINED.

The Court erred in each instance in sustaining plaintiff's objections to the following questions because the same were all addressed to relevant and material matters, and for other reasons given to certain specific questions hereinafter, viz.:

38. Q. Asked Witness Horst: Did you not in the latter part of November, 1912, buy some Cosumnes hops from Wolf, Netter & Co.? The substance of the testimony rejected was, that plaintiff had bought a quantity of Cosumnes hops from Wolf, Netter & Co., at 17¢ a pound.

On the additional ground that the reason for the ruling was that the testimony must be confined to air-dried Cosumnes hops, and the agreement between the parties as finally made was that the defendant would accept hops equal to four samples 21 to 24 and the contemporaneous interpretation of the parties was that any kind of Cosumnes hops would fulfill the contract.

39. Q. Did you buy Cosumnes hops of the same quality as air-dried Cosumnes hops in the latter part of 1912?

The substance of the testimony rejected being that the plaintiff itself purchased Cosumnes hops of the same character as the samples in question at 17¢ a pound.

On the additional ground that the Court refused to allow the said question unless it was modified to apply to air-dried Cosumnes hops.

40. Did you buy hops in San Francisco of a character which was accepted by the trade as Cosumnes

hops which could have been used as a delivery on the four samples numbered 21 to 24, submitted [334] by the Pabst Brewing Company to you? The substance of the testimony being that the plaintiff itself purchased Cosumnes hops of the same character as the samples in question at 17¢ a pound.

On the additional ground that counsel for defendant had given as his purpose that the answer would show that while plaintiff sold Pabst hops for 14 and 15 cents, that they at the same time bought other hops of the same character at 17 cents, and did not use proper care in the sale of hops and that it was preliminary first to show that plaintiff bought Cosumnes hops and then that the hops thus bought were the same character commercially as air-dried hops and thereafter.

The Court rules that it would not permit the testimony concerning the price of any hops bought that were not air-dried Cosumnes hops.

41. I want you to state whether the 4,500 bales were stored? (Exception #66.) The testimony rejected was the means of establishing where all the goods manufactured by the plaintiff and which plaintiff claimed was capable of completing the delivery was stored, and in that way defendant would have been able to show that the plaintiff did not have 2,000 bales on hand on November 4th.

Because it was essential on cross-examination to know the whereabouts of all air-dried Cosumnes hops grown from the time they were stored till sold, to determine whether or not there was 2,000 bales available on November 4th, 1912, and the proper amount to be

allowed as damages incurred in selling the same.

42. What bales of Cosumnes hops had you on November 4th, 1912, already set aside to fill contract sales in existence? (Exception #67.) The substance of the testimony rejected would show that a large number of the 4,300 bales manufactured by plaintiff had been set aside to fill contracts in existence and thereby [335] prevented plaintiff from being able to fill its contract with defendant.

43. Did you buy hops in San Francisco of a character that was accepted by the trade as Cosumnes hops which could have been used as delivery on the four samples 21 to 25 submitted by the Pabst Brewing Company to you?

The rejected testimony would have shown that plaintiff purchased hops in San Francisco which could have filled his contract at 17¢ a pound and he claimed to be damaged because at that date they were only salable for 11 and 12¢ a pound.

On the additional ground that the Court announced that plaintiff would not be bound to make any purchase of hops that he might imagine would be acceptable under his contract when they were not the hops that were called for by the contract and the attorney for defendant saying:

"It is for the purpose of showing that while he sold our hops for 14 and 15 cents, that he bought other hops for 17 cents of the same character, and therefore he did not use proper care in the sale of our hops."

The COURT.—If you have reference to the same character of hops stipulated for in the contract, I

will admit; otherwise I will not.

COUNSEL.—It is preliminary, first, that he bought Cosumnes hops, and then I want to show that they were not of the same character commercially as air-dried.

The COURT.—I will permit you to show that he bought air-dried Cosumnes hops.

Mr. POWERS.—I have stated my purpose. May I now renew my objection with the purpose stated, and save my exception? That goes to all the questions.

The COURT.—Yes. [336]

44. Will you give me the deliveries and dates of delivery of Cosumnes goods that you made on your contracts which were in existence at the time of the commencement of the season in 1912?

The substance of the testimony rejected was that a large amount of the goods which were on hand at the commencement of the season and available for delivery to defendant, over 600 bales were sold for prices far in excess of those testified to by the plaintiffs' witnesses.

45. Also, give me the price for which you sold the 3,062 bales plaintiff had on hand on November 4th, 1912, at the time of selling the 2,000 bales on account of Pabst.

The substance of the testimony rejected was that a large number of 3,062 bales over 600 bales, were sold at prices far in excess of the prices obtained on other goods set aside to defendant.

46. Is it a costly matter to assemble the office force?

The substance of the testimony rejected was that a great part of the overhead expenses were maintained for the general business of preventing the cost of assembling a new office force for the succeeding year and not because of the sale of the Pabst goods.

47. Will you give me the amount of the general expenses for the month of July, 1913, and then we can see how they differ from the month of June.

The substance of the testimony rejected was the expenses in July and June were practically the same.

48. What allotment had been made to these various contracts when the Pabst contract was breached, according to your theory, November 4th, 1912?

The substance of the testimony rejected was that no [337] specific bales had been allotted to any of these contracts by allotments made of November 4th, nor until several months thereafter.

49. Kindly give us the amount that the 1060 bales finally sold for.

The substance of the testimony rejected was that 1060 bales sold for prices far in excess of the prices obtained for contracts that were alleged to have been filled with goods held for Pabst account, some as high as 26 cents a pound.

On the additional ground that the hops were used after November 4th, 1912, to fill orders made prior to November 4th, and these were available for the Pabst order, and the jury would have had the right to have considered that the money received for those hops was a proper credit to be given on the damages to the defendant.

50. Look up and see whether there was any reduc-

tion of prices to the brewers because of a rejection of Cosumnes hops in 1912.

The substances of the testimony rejected was that the prices testified to for a large amount of the goods claimed to be Pabst goods was at a reduced figure because they had been rejected by other brewers because of poor quality.

On the additional ground that the basis of the ruling was that the only contract for choice air-dried Cosumnes hops made by plaintiff was with the Pabst contract and as a matter of fact the question was addressed to whether or not the Cosumnes hops of plaintiff had been rejected for bad quality.

51. What services, if any, did the stenographer perform with reference to the Pabst goods, if you know of your own knowledge?

The substance of the testimony rejected was that the witness knew nothing of his own knowledge of the services performed by the stenographer nor their connection with the so-called Pabst goods. [338]

52. Q. Asked Witness Horst: What steps, if any, did you take to set aside that 2,000 bales for the Pabst people at that time?

The substances of the testimony rejected was that plaintiff took no steps to identify any 2,000 bales then on hand as the goods of defendant.

Because it was absolutely necessary to know the facts involved in the question, in order to intelligently determine what damages had been sustained by breach of the contract.

53. Q. Did you, when the Pabst people notified you that they would not take these goods because of

their quality, that it was not according to their understanding of the contract, set aside, or take any steps to set aside or to use any marks or any indications that any portion of the 2,900 bales were set aside for the Pabst people?

The substance of the testimony rejected was that plaintiff did not take any steps to set aside or use any marks to indicate any portion of goods on hand for defendant.

54. Did you have any other goods on hand save and except these 2,900 bales of your Cosumnes raised hops to fill the contract that had been accepted?

The substance of the testimony rejected was that plaintiff did not have any other goods on hand to fill defendant's orders except hops raised by itself.

For the same reason as that given to the last question.

55. Q. Were the samples 25 to 38 of Cosumnes hops all air-dried Cosumnes hops, or were they other kinds of hops?

The substance of the testimony rejected was that samples 25 to 38 were in part Cosumnes hops which were not air-dried.

56. Q. Is there any way you have of refreshing your memory so that you could tell us? [339]

A. No, they are all air-dried. I do not think they were all Cosumnes hops. I could tell which were Cosumnes hops by looking at the marks on the samples.

Q. Will you do so, please.

Mr. POWERS.—My question is, were the 25 to 38 samples all Cosumnes hops, all air-dried Cosum-

nes hops, or were there other kinds of hops?

Mr. DEVLIN.—I object as irrelevant, incompetent and immaterial.

The COURT.—Objection sustained.

The substance of the testimony rejected was that a portion of the samples were not air-dried and it was relevant because the answer would establish the contemporaneous interpretation of the character of hops intended to be covered by type samples 21 to 24.

57. Suppose you cut the quantity of 2,000 bales up into ten lots of 2,000 each, would they have been more salable?

The substance of the testimony rejected would have been that if the 2,000 bales had been offered in lots of 200 each that they would have found ready salability at prices 17 to 18 cents in California and 21 to 23 cents in the east, and it was error because the question was overruled on the ground that the matter had been gone over time and time again when as a matter of fact the said witness had never answered the said question or any of the same character.

58. Q. Asked Witness Conrad: Was there any reason why plaintiff's hops should have sold at less figure than anybody else's that year?

The substance of the testimony rejected was that the only reason plaintiff's hops should have been sold at less figures, was because they were of poor quality. [340]

59. Q. Asked Witness Lange: Was there any act done by the Horst Company so as to segregate 2,000 of the 3,000 bales after November 4th, so that any

person other than the Horst people themselves could determine which of the 3,000 bales were to be considered as Pabst goods, and sold on the Pabst account? (Exception #50.)

The substance of the testimony rejected was that no steps were taken by any person who knew which of the Horst goods were Pabst goods and which were not and there was no means of witness knowing which of the goods were being sold as Pabst goods.

60. Q. Was it necessary to maintain an office in New York with a manager's salary at the sum of $500 per month in order to sell 16 bales of Cosumnes hops? (Exception #51.)

The substance of the testimony rejected was that the expenses were not necessarily incurred in any way for defendant.

61. Q. What was the expense of the New York office for salaries while those 16 bales were on hand to be sold on June 1st? (Exception #52.

The substance of the testimony rejected was that the salaries were in excess of $500 per month.

62. Q. How many of the Pabst goods were on hand unsold on January 1st, 1912?

The substance of the testimony rejected was that the number of bales on hand at that time was less than 100 and it was material, because at that time a large number of expenses were being prorated to the Pabst goods and it was for the jury to determine whether or not an ordinary reasonably careful man would have used the method of selling which required a manager at $500 per month and to pay for Christmas presents to the stenographer and to hire stenog-

raphers when but 16 bales of hops were on hand. The testimony had already developed that the bulk of the so-called Pabst goods had been sold in the months of November [341] and December, 1912.

63. Q. Asked Witness Marks: What would be the reasonable market value of a hop of the character of samples 1 to 20 if it were choice, in the month of November, 1912?

The substance of the testimony rejected was that the said value was 17 to 24¢ a pound in the Sacramento market.

64. Q. Asked Witness Marks: Suppose you cut the price to 16½ cents, how long would it take you to have sold 2,000 bales?

The substance of the testimony rejected was that it would have taken less than two weeks to have sold the goods at that price.

65. Q. Asked same witness: Was the market in a position at that time, if the price of hops was cut down to 16 cents, to have taken 2,000 bales, or not?

The substance of the testimony rejected was that the market would have taken 2,000 bales at that price very readily inside of two weeks.

66. Q. What would be the reasonable market value of choice air-dried Cosumnes hops at that time, dried in accordance with the process, whereby drying was made by forcing air from the outside in through the hops?

The substance of the testimony rejected was that the reasonable market value of such hops was 17 to

67. Q. You have seen certain samples of the Horst

20¢ a pound in the Sacramento market.

hops. What would be the reasonable market value of a hop of the character of one to twenty if it were choice, in the month of November, 1912?

The substance of the testimony rejected was that the value was 18 to 20¢ in the Sacramento market. **[342]**

68. Q. What was the reasonable value of choice air-dried Cosumnes hops dried under a process whereby the hot air is put into the kiln from the outside?

The substance of the testimony rejected was that the value was 18 to 20¢ in the Sacramento market, in November, 1912.

69. Q. Asked Witness Sweeney: Did you actually sell the Pabst Brewing Company some hops of a choice character in November, 1912, for their brewing purposes?

The substance of the testimony rejected was that the witness sold hops to defendant for 22¢.

70. Q. Are you familiar with the reputation of brewers throughout the United States with reference to their character and in the matter of rejecting goods and their reputation for rejecting goods?

The substance of the testimony rejected was that the witness was familiar and that the Pabst Brewing Company had never rejected any hops except those of Horst and his brother, and the testimony was admissible because Mr. Powers' statement that it was rebuttal of Mr. Horst's testimony that the Pabst people had a reputation for rejecting goods.

71. The Court erred in requiring Witness Sweeney to confine his testimony to air-dried hops under the following circumstances:

Q. Asked Mr. Powers: Were you familiar with the value of Cosumnes hops in the month of the year 1912? A. I was.

Mr. DEVLIN.—I shall object unless the inquiry be confined to air-dried hops.

The Court then said: "He does not think that has any significance. I am bound to instruct the jury that it has. It characterizes the class of hops that are called for by this contract. [343] Confine yourself to air-dried hops."

72. The Court erred in sustaining defendant's objections to the question asked Witness Chalmers:

What was said to you by the man in charge with reference to the manner of baling the hops so far as the leaves and twigs were concerned?

The substance of the testimony rejected was that the man in charge said that plaintiff had instructed witness to bale the hops, permitting the leaves and twigs to go into the bales.

This was relevant testimony as statements made by a representative of the corporation, with reference to the baling of the hops in question.

73. Q. Asked Witness Chalmers: While you were at the Horst hop house and seeing the picker at work in the manner in which you state, did the man in charge say anything to you about the manner in which he was picking hops so far as the leaves and stems were concerned?

The substance of the testimony rejected was that

the man in charge of plaintiff's hop-picking machine said that he was instructed to permit leaves and stems to go in because they had a cheap contract in the east and the testimony was that the Pabst contract was the only contract on hand at that time.

The question was relevant because directed to matter entirely relevant, competent and material because the hops there referred to were a portion of the 4,500 bales which Mr. Horst had testified were all of the same character, as to cleanliness with the exception of a few bales called clean-ups.

74. To the question asked Witness Chalmers: Was anything said by the man concerning instruction, because of certain goods that were to be used to fill an eastern order? [344]

The substance of the testimony rejected was that the man said he had instructions from plaintiff to permit everything to go into the bales because plaintiff had a large eastern order to fill.

Same was relevant because offered in rebuttal of Mr. Horst's testimony that the goods were picked unusually clean and was entirely relevant and material because of testimony that the Pabst contract was the only contract of plaintiff referring to air-dried hops.

75. Q. Asked Witness Chalmers: At that time you say you were employed taking care of your crop?

The substance of the testimony rejected was that the plaintiff was occupied in carrying on his usual vocation.

76. Q. Asked Witness Chalmers: What, if anything, was said by the man in charge of the picking

machine concerning instructions with reference to hops that were going into the picking machine?

That the substance of the testimony rejected was that the man in charge said he had instructions to allow the stems and leaves to go into the bales through the picking machine together with the hops.

The testimony was entirely relevant because the hops themselves were a portion of the 4,500 bales which Mr. Horst testified were of the same general character as to cleanliness.

77. Q. Asked Witness Chalmers: Do you know about the relative time that hops usually ripen?

The substance of the testimony rejected was that all hops in that vicinity ripened at about the same time and that none of plaintiff's hops were ripe enough to pick at the time plaintiff commenced picking them.

78. The Court erred in objecting and sustaining objections to all [345] questions asked Witness Chalmers covering the operations of plaintiff's picking machine.

The substance of the testimony rejected was that witness visited the picking machine and saw that the hops being picked were unripe and that the machine was out of order and that the stems and leaves were being permitted to go into the machine and to be baled and that the man in charge said he had instructions from plaintiff to permit them thus to be baled.

This was relevant because the testimony that the leaves and stems were being intermingled with the hops was in direct rebuttal of Mr. Horst's statement

that the leaves and stems were segregated and put in separate bales and was rebuttal, and the testimony with reference to the fact that a part of the machine was not working, and that the employees had instructions to let everything go in, all was rebuttal of Mr. Horst's testimony and went to show that the hops were uncleanly picked.

79. The Court erred in striking out all of the testimony of Witnesses Chalmers and Traganza during the argument of the trial of the case. The character of this testimony is set forth in the last six specifications herein.

80. Q. Asked Witness Gustav Pabst: You may state, the fact, if any there be, whether or not the Pabst Brewing Company, relied upon the fact that the plaintiff sent the samples as evidencing plaintiff's compliance with the demand as to samples made in the purchase order.

The substance of the testimony rejected was that the Pabst Brewing Company relied upon the sending of the samples as an evidence that plaintiff acquiesced in defendant's demand for samples.

Because the contemporaneous interpretation of the telegrams [346] and letters was material.

81. Q. You may state whether the sending of the samples as evidenced by letter of September 28th, 1912, influenced your mind as to the acquiescence of the plaintiff in the necessity for sending samples.

That the substance of the testimony rejected was that defendant's mind was influenced by the send-

ing of said samples as an evidence of the acceptance therefor.

82. Q. Did Mr. Zaumeyer to whom you referred in your testimony, report to you the finding in respect to the various samples submitted by plaintiff?

The substance of the rejected testimony was that Mr. Zaumeyer reported that the samples were not choice.

83. Q. You may state whether or not it was the duty to make report to you as the president of the corporation, upon the inspection of such samples.

The substance of the testimony rejected was that Mr. Zaumeyer was employed to pass upon the quality of the samples.

84. Q. You may state whether the receipt of the samples 1 to 20 had any influence in the conduct of the business of the Pabst Brewing Company.

The substance of the testimony rejected was that defendant was compelled to demand further samples in order to know whether plaintiff was in position to furnish defendant with its stock of hops necessary for the season and that the sending of samples by Horst indicated an acquiescence in the selling order contract as prepared by defendant.

85. Q. Asked Witness Traganza: Did the man in charge of the picker, state what his instructions were with reference to handling the leaves and stems? [347]

The substance of the testimony rejected was that the picker stated that he had instructions that the leaves and stems should be permitted to go into the picking machine and to be baled with the hops.

IN ADDITION TO THE FOREGOING THE COURT ERRED IN THE FOLLOWING PARTICULARS:

86. In permitting the introduction of the night letter sent by Horst to Pabst, dated November 5th, 1912, over defendant's objections, on the ground that it was offered as a compromise.

San Francisco, Nov. 5/1912.

Pabst Brewing Co.,
Milwaukee, Wis.

Replying your yesterday's wire received today, we disagree with your comments on quality of samples sent you and to your statement that we are unable to comply with our contracts with you Please wire us in what respects you claim samples twenty-five to thirty-eight inclusive to be below contracted quality and whether you claim none of all samples sent you is equal contracted quality. Please also wire whether you will pay us decline in market if we consent cancellation two thousand bale sale we cannot release contracts without proper settlement. we suggest that our letter October eighteenth offers fairest method of adjusting matter. We are willing submit further samples and are willing that Chief Inspector of San Francisco Chamber of Commerce or other high class competent disinterested parties to be agreed upon shall pass upon quality.

E. CLEMENS HORST.

Charge E. C. H. Co.
137 Words.

87. In permitting the following letter to be introduced, to wit:

"San Francisco, Oct. 18th, 1912.

In reply refer to H-53959.

Pabst Brewing Co.,

Milwaukee, Wis.

Gentlemen:

We are without answer from you to our wire of Oct. 15th. As you will not take the 2000 bales hops sold you on quality equal to any of the 20 samples we sent you, nor commit yourselves to take any hops equal to the four samples you sent us, we feel the fair plan that should be most suitable to you will be to agree upon a difference in price to be paid us on the 2000 bales.

To arrive at that amount, we should get, if market had not changed, the fair profit as between simultaneous buying and selling prices, and as market has declined we should get in [348] addition, the decline in the market, but if you think that this is asking too much we are ready to accept, subject to our confirmation within three business days after receipt of your reply, whatever may be the difference between the contract price and any figure you may offer us now on 2000 bales 1912 hops equal to the four samples you sent us, or to the selection of the 20 we sent you. The new offer to be made on basis of delivery in lot or lots at sellers option during October to February inclusive, and official inspection of the San Francisco Chamber of Commerce, or other inspection to be mutually agreed upon, to be final.

Or if you prefer to delay the fixing of price on above plan, we are willing that you pay us the

difference as of a later date plus what would be the carrying charges on 2000 bales hops, which we estimate to amount to about $750.00 per month, covering interest, storage, insurance and loss in weight. The delay in delivery has already entailed a loss of $1000.00 on such charges, but we are not asking you to make good that $1000.00.

On our above plan you cannot increase your losses nor your hop stocks, because if we accept the price you offer on the new 2000 bale deal you will not have increased your stocks, as our acceptance of your offer will have cancelled the old deal and the new price you offer will be used as a basis for our arriving at the amount of money you should pay us by reason of cancellation of your present contract.

We have made our suggestion for the new offer to buy 2000 bales simply so you do not wire us a too high price for basis of adjustment.

You no doubt realize that 2000 bales hops is an enormous block of hops to sell at any time of the year and at a time as *last* as this it is always much harder to sell California hops and there is an enormous lifference between the price at which any one in the Hop business would buy 2000 bales and the price at which he would sell 2000 bales, unless, of course, the purchase was being made without speculation against a concurrent sale or offer.

In order to realize anything like current prices for hops they have to be peddled at enormous selling costs and we really do not know how long it will take us to sell elsewhere 2000 bales California hops

so late in the season, but we want to help out all that is possible.

We made you a number of offers to change your purchases to Sonomas, Oregons, Washingtons, Yakimas, States or foreign 1912's, or to change from 1912's to future years, all at fair price differences to be agreed upon, but regret that these suggestions, as well as our offers, both before and since the harvest, to resell for your account your 2000 bales purchase were all declined.

We are desirous of impressing upon you that we do not wish the slightest advantage by reason of your change of mind on your Cosumnes hop purchases, but we do ask your consideration for a prompt and fair adjustment of the matter and we hope our above suggestion will meet your approval. [349]

No doubt you realize that your publishing the fact that you will not use Cosumnes hops greatly depreciates their market value and the greater such depreciation the greater your loss, and, therefore, it is far better in both your interest and ours that the market value of the Cosumnes hops be maintained.

There are plenty of brewers that are having successful results with our Cosumnes hops and it does not pay to influence their minds against them.

Faithfully,

E. CLEMENS HORST CO.

E. C. HORST,

Pres."

ECH/J.

On the ground that it was an offer of compromise, argumentative and self-serving declaration.

88. The Court erred in refusing to strike out the testimony of Lange concerning the overhead charges, insurance and the like because it was hearsay testimony. The substance being that certain entries made by others from transactions carried on by employees in the east showed certain charges.

89. The Court erred in refusing to strike out the testimony of Witness Horst concerning the existence of the 2000 bales belonging to defendant at the time of the breach, on the ground that he referred to records to show their whereabouts and refused to produce the records and testified that none were "earmarked" to identify them as defendant's property. Exception #61.

90. The Court erred in refusing to strike out the testimony of Witness Horst, with reference to the portion of the 3062 bales of hops, which were designated by him as Pabst goods, or being used by him for the purpose of completing the Pabst contract, because the substance of the testimony showed it was impossible to determine that there were 2000 bales on hand on November 4th, 1912, or what was the price paid for any hops available to be used to fill the Pabst contract and because simultaneously there were other goods in the 3062 bales then on hand sold for higher prices which were not in any way earmarked as belonging to others [350] but which were not included in the Pabst sale.

91. The Court erred in refusing to strike out all the testimony of Witness Peterson, on the ground that he did not claim to be a hop expert.

92. The Court erred in overruling plaintiff's

objections to the testimony as to losses incurred for bad debts and uncollectible accounts, for goods claimed to have been sold on account of the Pabst Brewing Company, at the time the sales were made they were not made for the Pabst account but subsequently when the losses occurred, and plaintiff then claimed that they were Pabst's sale.

93. The Court erred in refusing to strike out the testimony as to loss by bad debts. Exception #36.

There was no particular 2000 bales set aside for the Pabst people and there was no evidence to show which of the 3000 bales which were on hand on November 4th, 1912, were designated as Pabst sales, so therefore it could not be determined whether or not the losses took place on them and whether or not the losses took place on goods first sold on other contracts, nor whether or not the people were able to pay, was hearsay testimony.

94. Also the Court erred in refusing to allow Witness Lange to tabulate a number of the 1912 air-dried Cosumnes hops from plaintiff's ranch which had been rejected and the history of each of the bales that had been designated as Pabst goods showing where they were stored.

95. Also the Court erred in denying the motion to strike out all of the evidence of overhead charges depending upon items that were not shown to be directly connected with the 2000 bales of Pabst Brewing Company goods, or the goods that Horst set aside for Pabst Brewing Company, which had been designated to fill the order of Pabst Brewing

Company, because it was based on hearsay [351] evidence of the manner in which the expenses were incurred, irrelevant and immaterial and conclusion of the witness as to how much of each particular account should be charged and was absolutely based on matters that lay partly in law and partly in fact and calling for the information of the witness and question of law.

96. The Court erred in overruling the introduction of the calculations of the Witness Lange as to interest, storage, freight on tare, insurance, local freight, on the ground that it was not shown to be connected with the 2000 bales of hops that were used for the Pabst shipment, and based on hearsay evidence and were conclusions of the witness in matters of law.

97. The Court erred in refusing to strike out the answer to the following question asked Witness Lange:

Q. What books did you have to examine to find the price at which the 2000 bales of Pabst hops were sold?

A. I examined the books to find out to whom the hops were sold after November 4th, 1912. I figured out the average number of days. * * * I went through the books and found the price at which we had sold the 2000 bales to other parties.

It is not responsive to the question, and is irrelevant and immaterial and necessarily based on hearsay evidence.

98. The Court erred in refusing to strike out the answer to the question.

Q. Did you figure any interest on losses as follows?

A. I figured the difference between the price we sold to Pabst and the price we sold to the other parties.

Because it is not responsive to the question and was necessarily hearsay, and also refusal to strike out portion of the answer to the same question reading as follows: [352]

"Most of the sales made of the 1,920 bales of the 2,000 bales were sold other parties after November 4th, 1912, were sold on delivery prices."

Because not responsive to the question and necessarily based on hearsay.

99. The Court erred in refusing to strike out the answer to the question:

Q. What is the aggregate of the miscellaneous charges, storage, local freight, cartage, sampling, repairing and any other charges you could have vouchers for?

The answer*ing* being in substance as follows: "We know just what lot those items cover. It not being responsive to the question and being necessarily hearsay.

100. The Court erred in overruling the objection to the question asked Witness Lange:

Q. What is the aggregate of miscellaneous charges consisting of storage, local freight, cartage, sampling and other charges like that which you could have vouchers to cover?

The substance of the answer being, that he figured interest at six per cent, the sale being the 1920 bales sold other parties after November 4th, 1912, on de-

livery prices and that there was various freight rates covering these sales; there was freight on tare and items of storage on hops on November 4th, on and there was one per cent discount allowed certain brewers and that there was certain bad accounts due and uncollectible, the difference between the amount of the invoices and the amount collected.

The same was necessarily based upon vouchers made by other persons concerning transactions of which the witness had no knowledge whatsoever and about which there was no testimony of [353] any person having any knowledge.

101. The Court erred in refusing to allow the defendant to cross-examine Witness Flint in the matter of whether certain hops were considered to be the best average hops of a district.

102. The Court erred in refusing to allow the defendant to cross-examine Witness Fielder in the matter of the state of the Horst crop as to ripeness at the time they were picked.

103. The Court erred in instructing Witness Sweeney to confine his testimony to air-dried Cosumnes hops.

104. The Court erred in making an order striking out the testimony of Witness Chalmers to the question:

Q. What did you observe about the picking machine on the Horst ranch? and in saying, "You will find that he does not know anything about whether they went into these hops or not."

105. The Court erred in refusing to allow Witness Traganza to testify to what he saw concerning the

hop picking plant in operation at plaintiff's plant, in August, 1912.

106. The Court erred in striking out the testimony given by Witness Chalmers on the last day of the hearing, and stating that the witness did not know anything about what he was testifying to.

107. The Court erred in refusing to allow Mr. Traganza to testify as to the picking conditions.

108. The Court erred in permitting any testimony based upon the books of the plaintiff because there was no evidence introduced to show that the books were regularly kept. On the contrary, the evidence showed that many of the entries were made temporarily to be subsequently changed, and because none of the persons who made the entries in the Chicago and New York offices testified as to the correctness of the records, nor that the entries were made simultaneously, with the transactions, nor that they were [354] correct transcript of original entries made simultaneously on about the time of the transactions in question.

109. The Court erred in allowing any of the entries in the books until they were shown to have been made by some person who knew whether the expenses were incurred concerning bales which has been designated as part of the Pabst sale or other bales and for that reason none of the evidence concerning the entries made in the books because of report*ed* from the Chicago and New York offices were material and the Court erred in permitting testimony to be introduced as to deductions drawn from the entries made through such reports.

110. The Court erred because it did not require plaintiff to first prove that the entries made in the books were made contemporaneous with the facts to which they related and that they were made by parties having personal knowledge of the fact who corroborated by their testimony that the entries were proper and because many of the entries were made from January to the first of June, 1913, at a time when but a very small portion of the Pabst so-called hops remained unsold, for instance, in the month of June, less than 16 bales remained unsold and yet the entire expense of the Chicago and New York offices were declared to be connected with the sale of said 16 bales and the expenses prorated in connection therewith.

111. The Court erred in permitting witnesses Lange and Horst, who were familiar with the work actually done and expenses actually made to determine what was the proper portion of prorating of the expenses of the offices in New York and Chicago as between so-called Pabst goods and other goods and the general carrying on of the Horst business.

112. The Court erred in permitting the testimony of the witnesses of plaintiffs Lange and Horst referring to the books without requiring [355] the books themselves to be introduced in evidence concerning the sales which plaintiff's witnesses testified to were made by the process of taking a portion of the air-dried hops which were on hand on November 4th, 1912, and applying them to contracts which were in existence theretofore, without permitting to defendant to introduce the prices thus obtained for

these goods so that the jury might have an opportunity of determining whether a reasonably careful man would have considered these sales as being on the Pabst account as against other sales, selected by plaintiff after the sales took place.

113. The Court erred in refusing to allow the testimony concerning the prices paid by plaintiff for Cosumnes hops which were not air-dried, but which were purchased by Horst in November, 1912, because Horst testified that some of the samples sent by him included in 25 to 38 were not air-dried, and all of the witnesses testified that the commercial value of air-dried Cosumnes and other Cosumnes were identical and Horst himself testified that he could not tell the difference between the air-dried and the kiln-dried Cosumnes hops when they were in the market.

114. The Court erred in permitting Witnesses Horst and Lange to testify concerning the expenses of the 1,300 bales which were claimed to have been sold on the Pabst account, because these witnesses were not shown to have had any data on which to base a proper prorating of the expenses for the sale of these particular goods with the other goods, some of which were of similar character and some of which were of dissimilar character, and because the necessary prorating carried with it conclusions of law as to the manner of application of expenses under the circumstances which existed at various times from November, 1912, to June, 1913. [356]

115. The Court erred in refusing to strike out the testimony of Witness Horst with reference to the price for which Pabst's 2,000 bales of goods were

sold because no portion of the 3,062 bales on hand November 4th, were designated as Pabst goods or as being used by him for the purpose of completing the Pabst contract and because, after all the goods were sold and 1760 bales being used to fill contracts which were in existence on November 4th, and more than a year after the sale, segregation was made imperatively selecting the sales at the lowest price as on Pabst account.

116. The Court erred in refusing to strike out the testimony of Witness Lange concerning the losses because of bad accounts, because the same were irrelevant and immaterial and based on hearsay evidence. The witness Lange knowing nothing about the conditions under which the sale took place and the manner of attempted collection.

Because it was not shown there was any particular 2,000 bales set aside for the Pabst people at the time Horst sold the goods to the persons whose accounts were subsequently claimed to be bad.

117. The Court erred in refusing to strike out the answer to the question asked Witness Horst, under the following circumstances:

Q. As a matter of fact was not that manager of your New York office up to Montreal and spent a great portion of his time trying to sell goods up there in November, 1912?

A. They were traveling around all the time. We took the expenses they incurred in traveling around all the time and apportioned them. All of the time they were trying to sell these hops.

The answer was not responsive to the question and

contained matter which was irrelevant and immaterial and based on hearsay evidence. [357]

118. The Court erred in refusing to strike out the answer to the question asked Witness Lange:

Q. What services, if any, did the stenographer perform, with reference to the Pabst goods, if you know of your own knowledge?

The answer being, "You are segregating an item according to the Pabst goods when all of the services were rendered for all of the goods that were sold at that time.

Counsel asked Witness Lange:

"Q. Do you know what services he performed, if any, with reference to the Pabst goods at that time?

The Court stated it would not make a particle of difference. Mr. Powers then saying: You have no means of knowing what those stamps were used for or what that exchange was for, of your own knowledge.

A. As far as I am concerned, I was not there watching the stamps go out, but I can say what the stamps were probably used for. They must have been used to pay postage on letters. Other than that I do not know.

Q. What connection did these expenses have to the 2,000 bales or the 16 bales that were left on hand at that time?

A. We did not apply them to any particular hops. This is a part of the expense for running the New York office.

Q. Of your own knowledge, you do not know what they are for?

The COURT.—I presume you are asking these questions for the purpose of moving to strike this out on the ground that he is testifying to hearsay.

Mr. POWERS.—Yes.

The COURT.—The motion is denied.

Q. Your answer would be the same as far as all of the other items are concerned of the New York office, would it not? [358]

A. In reference to my knowledge of the entries I know nothing about them other than these are expenses for running the New York office. These are expenses we paid to our men, and they came to us and we entered them in our books.

119. The Court erred when Witness Lange was asked the question.

Q. Do you know personally what was done with reference to whether there was any segregation or not of any portion of those expenses for these particular Pabst goods or not?

The COURT.—It is not necessary for you to understand the question because Mr. Powers' previous examination has shown that you cannot know.

Q. All of your testimony with reference to these transactions during that period, regarding expenses of these eastern offices, is being given simply as a result of your examination of the books?

A. Entirely.

Mr. Powers, moving as follows: I move to strike out all of this witness's testimony on the ground that it is based on hearsay.

120. The Court erred in denying the motion that

all of the evidence of Witness Lange with reference to overhead charges be stricken out on the ground that it is dependent and is not shown to be in any way connected with the Pabst Company goods or the goods that Horst set aside for Pabst Brewing Company or designated to fill the order of Pabst Brewing Company and was based on hearsay evidence and was a conclusion of the witness as to the particular amount that should be charged to Pabst goods based upon the matters that lay partly in law and partly in fact and calling for the opinion of the witness, and after witness Lange had made the admission quoted in the last specification.

The substance of the testimony rejected was that the overhead [359] charges to sell 3,062 bales of Cosumnes hops which were on hand in November, 1912, should be prorated in such a way that $4,459.30 should be charged against the defendant because of storage, insurance, bad debts, bookkeeping, traveling expenses, stenographer, Christmas presents, and other charges of that character.

121. The Court erred in allowing the conclusion of the witness as to interest, storage, freight on tare, insurance and local freight because the same were immaterial and incompetent as they were not in any way connected with any hops that were set aside for the Pabst people nor any testimony of any person familiar with the facts as to any of the charges that were entered in the books.

122. The Court erred in refusing to allow witness Horst to get data as to rejections of hops made by the Pabst Brewing Company, offered in rebuttal of

his testimony that the Pabst people had been in the habit of making rejections.

123. The Court erred in refusing to strike out the testimony of the Witness Horst in reference to the 2,000 bales belonging to Pabst on the ground that his only knowledge of sales was by reference to records of sales not made by the witness himself, and with which he had no connection and which were not properly in evidence.

124. The Court erred in the ruling to a question asked Witness Lange:

Q. You say there was a certain 2,000 bales of hops on November 4th, 1912, in certain warehouses. Will you show me the record of the warehouses of those bales on November 4th, 1912?

A. I can show you some of the records. They are in several books. We did not bring them all here. I started out to do that with Mr. Farrell. [360]

Mr. POWERS.—I move to strike out the answer as not responsive to the question.

The COURT.—The answer is responsive to the question. I do not propose to permit you at this time to go into a detailed examination of all of these entries. You may pick out one or two items. I have no disposition to keep anything from you that you have called for in the proper way, but the Court has got to protect itself and the jury against the delay that would insue from an examination of things of this kind in the courtroom that should have been examined outside.

Mr. POWERS.—I except the statement of the Court, because my understanding of the law is that

when entries in books are referred to, that we have a right to examine those books.

125. The Court erred in denying defendant's motion to strike out the testimony of Witness Lange as to the shipment of goods after they arrived in Chicago and New York, because the testimony was all necessarily hearsay.

The substance of the testimony rejected was that some 1,300 bales of hops were shipped to various places in Chicago and New York, and that expenses were incurred aggregating over $5,000 on them thereafter, and that prices were obtained ranging from 12 to 18 cents and none of these transactions were carried on by the witness and the witness was not present when any of the charges were made or any of the transactions took place.

126. The Court erred in refusing to allow Witness Sweeney to *testimony* concerning whether or not Pabst Brewing Company had the reputation of rejecting goods and although Mr. Powers offered to prove that the only goods ever rejected by Pabst were the Horst goods. (Exception #81.)

127. The Court erred in refusing to allow Witness Chalmers to [361] testify, after Mr. Powers had made an offer that he would prove by him that he was present while the hops which were the subject of the testimony of Witnesses Horst and Lange were being baled and that he saw the leaves and stems being put into the drier and that subsequently those hops were baled as they were there, and that he actually saw the stems and leaves go into the hops with his own eyes. (Exception #64.)

The Court said. You will find that he does not know anything about whether they went into these hops or not. That is so in the nature of things, he cannot say.

128. The Court erred in refusing to allow the testimony of Witness Chalmers concerning the leaves and stems going into the hops which were being dried because the testimony showed that all of the hops thus being dried were plaintiff's air-dried Cosumnes hops, that 11 of the bales were being handled in the same way and Witness Horst had testified that with the exception of a small number of bales which were separately clean, that the remaining bales were all baled in the same way and sold in the same way and consequently any way which showed the manner *of* the leaves and stems entered into the bales was material evidence for the Court to know.

129. The Court erred in refusing to allow the man who had charge of the picking machine for plaintiff's corporation to introduce any evidence. The corporation must necessarily act through agents and the agent in charge made certain statements as to the manner of picking hops in question, and for that reason his statements were entirely material and binding on the corporation.

130. The Court erred in refusing to allow the evidence offered by Witness Chalmers with reference to the state of the hops picked [362] by plaintiff in August, 1912, concerning greenness and unripeness, because the testimony of the witness was that the hops in the samples 1 to 20 were unripened and this evidence tendered to corroborate the evidence

of the other witnesses and to contradict the statements of plaintiff's witnesses, that the hops were picked properly and were proper in color and were choice.

131. The Court erred in striking out the testimony of Witness Chalmers on the subject of the stems and the statement of the party in charge of the picking machine and as to greenness of the hops because all thereof was material as corroborative of the expert testimony of defendant's witnesses and rebuttal of the testimony of plaintiff's witnesses.

132. The Court erred in permitting the testimony as to custom with reference to time of delivery because there was a definite fixed time for deliveries made by Horst in one instance and was recognized by him in a draft of a contract submitted by him to defendant.

133. The Court erred in refusing to allow any testimony except as to air-dried Cosumnes hops because the contract as finally confirmed referred to hops equal to samples 21 to 24, and the contemporaneous interpretation of the contract by both parties was that any hops equal to those samples should be accepted, and Witness Horst testified that the samples 25 to 38 which were not air-dried, and Witness Lange testified that he did not think they were all air-dried Cosumnes hops.

134. The Court erred in submitting to the jury the question of whether or not the original contract made by the first telegrams in the year 1911 was not modified by subsequent letters and telegrams in 1912, because it was a question of law as to whether or not

the said contract had been modified and not one for the jury. [363]

135. The Court erred in permitting the Witness Horst to testify by the use of extracts from books in tabulated form, and permitting Witness Lange to testify from the contents of the books none of which were produced in evidence and in ruling that the defendant was compelled to verify the facts from cross-examination after they had been given an opportunity of examining the books.

136. The Court erred in permitting the Witness Horst to testify as to the sale price of goods which were held by plaintiff for defendant because there was no evidence to show that any specific goods were those held and because also the evidence of sales and all prices obtained from sales of these goods were only known to said Horst by examination of vouchers and statements of third parties about which he had no personal knowledge.

137. The Court erred in overruling the objection to question asked Witness Horst: Were you able or not to deliver out of the 4,300 bales you have specified, the 2,000 bales of hops for the purpose of filling the contract for Pabst Brewing Company, of the quality which the contract called for? Which was modified by the Court adding thereto "of the quality which the contract called for."

The question was irrelevant, incompetent and immaterial, and referred to matters in which *the* defendant was in no way connected;

The question was answered in substance as follows:

Yes, the samples sent to them were choice, air-dried Cosumnes hops and they were from these bales.

138. The Court erred in denying the motion to strike out the testimony of Witness Peterson, that the samples of hops from the Horst ranch shown him, were choice hops, because it called for the conclusion of the witness, and the witness was not shown to be an expert on the subject and admtited that he did not [364] claim to be such an expert.

139. The Court erred similarly in refusing to strike out the testimony of the other farmers who testified as to the character of the hops from samples. None of them claimed to be experts.

140. The Court erred in overruling the objection to the question asked Witness Lange: "Beginning on November 4th, 1912, until you finished selling the remainder of the bales, about 1,300 and some odd bales, were there certain expenses incurred in New York and Chicago and Eastern States in selling the remainder of the 2,000 bales of what we call the Pabst hops and other hops?

The question was answered in substance, as follows:

Yes, sir. That appears on the books of the company. The evidence was absolutely hearsay and not based on any facts known to the witness. (Exception #39.)

141. The Court erred in overruling the objection to the question asked Witness Lange: "Did the corporation of E. Clement Horst Company pay these expenses and these salaries based on those statements?

The question was answered in the affirmative: That they were paid before the suit was commenced in the ordinary course of business.

142. The Court erred in allowing in evidence calculations of Witness Lange on interest, storage, freight on tare, insurance, local freight. (Exception #58.)

The substance of the testimony being that these items amounted to $4,459.30 chargeable on goods sold on account of defendant. As the calculation was made an entries of transactions about which witness knew nothing. They were hearsay.

143. The Court erred in refusing to allow Witness Horst to state where the 4,500 bales produced by his company were stored. [365]

The rejected testimony in substance would have been the starting point to show that the goods were once stored and then shipped out prior to November 4th, 1912, and were not on hand to fill defendant's order on that date.

144. The Court erred in sustaining the objection to the question asked Witness Horst: Q. What bales of Cosumnes hops had you then (November 4th, 1912) already set aside for contracts then in existence?

The rejected testimony would have been that no bales of Cosumnes hops had been set aside at that time at all, and that all of the Cosumnes hops which were subsequently used in contracts were charged to Pabst account a short time before the suit was commenced. (Exception #67.)

145. The Court erred in sustaining the objection

to the question asked Witness Horst: Q. Will you give me deliveries and dates of delivery of Cosumnes goods that you made on your contracts which were in existence at the time of the commencement of the season of 1912?

The rejected evidence would have shown that plaintiff delivered Cosumnes goods on these contracts, which were then in existence and after this suit was commenced and a short time before the trial of the case that such of the contracts as sustained a loss were treated as Pabst goods, and such of the contracts as were sold at prices above that sold to Pabst, were considered as sales belonging to plaintiff and in that way defendant was made responsible for losses on contracts which plaintiff had in hand and as a matter of fact plaintiff did not have 2,000 bales on hand on November 4th.

146. The Court erred in denying defendant's motion to strike out testimony as follows: [366]

We took all of the sales of Cosumnes River hops that we made, exclusive of the clean ups, after November 4th. That made 1,500 bales, or a little over. That made a certain average price. Instead of putting the balance of the hops to make the 2,000 at that same average price, we put them in at the higher average price, being the lowest sales on the contracts. We had contract deliveries for a large quantity of hops. We had advance contracts for 20 or 30 thousand bales of hops, of Pacific Coast hops, but the average of the 1,500 bales made a certain figure. The 1,500 bales that we sold subsequent to November 4th. So instead of putting on 500 bales, on the aver-

age of the 1,500 bales, I put on those 500 bales at a price higher than the average was, so that there could be no question about the amount of damages.

The motion being as follows:

Mr. POWERS.—I move to strike out the testimony of the witness just given on the ground that it does not appear that any portion of these 3,062 bales were in any way disigned as Pabst goods, or as being used by him for the purpose of completing the Pabst contract, and because in addition thereto, there was certain other goods that were sold, that were available to be used by him for fulfilling the Pabst contract at an entirely different price than that given by him, and we have not the evidence of that. (Exception #69.)

147. The Court erred in allowing the question asked Witness Horst on rebuttal: Q. In your testimony, I asked you certain questions as to your ability to deliver 2,000 bales of hops equal to the samples 1 to 20. I now ask you if, on November 4th, 1912, you had 2,000 bales of hops on hand equal in quality to samples 21 to 24.

The witness had already testified as to the same matter in chief, and showed that he did not have that number of bales on [367] hand at that time, but in the rebuttal he answered in the affirmative.

148. The Court erred in interrupting Attorney Powers while arguing for the defendant and striking out the testimony of Witness Chalmers concerning the greenness of the character of the hops at the time they were picked by the plaintiff.

WHEREFORE the said defendant prays that the

judgment in favor of plaintiff herein and against the defendant be reversed and that said District Court of the United States, in and for the Northern District of California, Second Division, be directed to grant a new trial in said cause.

HELLER, POWERS & EHRMAN,
Attorneys for Plaintiff in Error (Defendant in Court Below).

[Endorsed]: Filed Feb. 4, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [368]

United States Circuit Court of Appeals, for the Ninth Circuit.

E. CLEMENS HORST COMPANY (a Corporation),

Plaintiff,

vs.

PABST BREWING COMPANY (a Corporation),

Defendant.

Order Allowing Writ of Error.

Upon motion of Heller, Powers & Ehrman, attorneys for defendant in the above-entitled action, and upon the filing of the petition for writ of error and assignment of errors,

IT IS HEREBY ORDERED that a writ of error as prayed for in said petition be allowed and that the amount of the supersedeas bond to be given by the defendant upon said writ of error be and the same is hereby fixed at the sum of Twenty-five thousand (25,000) Dollars, and that upon the giving of

said bond all further proceedings in this court be suspended, stayed and superseded pending such determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated February 4th, 1915.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Feb. 4, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [369]

United States Circuit Court of Appeals for the Ninth Circuit.

E. CLEMENS HORST COMPANY (a Corporation),

Plaintiff,

vs.

PABST BREWING COMPANY (a Corporation),

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, Pabst Brewing Company, as principal, and the American Surety Company of New York, a corporation, as surety, are jointly and severally held and firmly bound unto the plaintiff in the above-entitled action in the sum of Twenty-five Thousand ($25,000) Dollars, to which payment well and truly to be made, we bind ourselves and each of us jointly and severally and each of our successors, representatives and asigns firmly by these presents.

Sealed with our seals and dated this 26th day of January, 1915.

The condition of this obligation is such, that whereas, the above-named defendant is about to sue out a writ of error in the United States Circuit Court of Appeals, in and for the Ninth Circuit, to reverse the judgment entered in the above-entitled action in favor of the plaintiff therein and against the defendant therein, and awarding judgment in favor of the plaintiff therein for the sum of $22,625.30, and for costs in the sum of $252.80.

NOW, THEREFORE, if the above-named defendant, Pabst Brewing Company, a corporation, shall prosecute such writ of error to effect, and answer all damages and costs, if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect. [370]

IN WITNESS WHEREOF, the said corporations have caused their names and seals to be hereto affixed by their officers thereunto duly authorized, this 26th day of January, 1915.

PABST BREWING COMPANY.

[Seal] By I. W. HENNING,
Vice-Prest.

AMERICAN SURETY COMPANY OF NEW YORK.

By D. ELMER DYER,
Resident Vice-President.

[Seal] Attest: By V. H. GALLOWAY,
Resident Assistant Secretary.

The foregoing bond is hereby approved this 4th day of February, 1915.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Feb. 4, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [371]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,678.

E. CLEMENS HORST COMPANY, a Corporation,
Plaintiff,

vs.

PABST BREWING COMPANY, a Corporation,
Defendant.

Certificate of Clerk U. S. District Court to Record on Writ of Error.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing three hundred seventy-one (371) pages, numbered from 1 to 371, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $230.20; that said amount was paid by Heller, Powers & Ehrman, attorneys for the defendant, and that the original writ of error and

citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 19th day of August, A. D. 1915.

[Seal] WALTER B. MALING,
Clerk U. S. District Court, Northern District of California.

[Ten Cent Internal Revenue Stamp. Cancelled Aug. 19, 1915. W. B. M.] [372]

[Writ of Error (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Second Division, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Pabst Brewing Company, a corporation, plaintiff in error, and E. Clemens Horst Company, a corporation, defendant in error, a manifest error hath happened, to the great damage of the said Pabst Brewing Company, a corporation, plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things

concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 4th day of February, in the year of our Lord One Thousand, Nine Hundred and Fifteen.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by

WM. C. VAN FLEET,
United States District Judge. [373]

Return to Writ of Error.

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at

the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] WALTER B. MALING,
Clerk.

[Endorsed]: No. 15,678. United States District Court for the Northern District of California, Second Division. Pabst Brewing Co., a Corp., Plaintiff in Error, vs. E. Clemens Horst Co., a Corp., Defendant in Error. Writ of Error. Filed Feb. 4, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Citation on Writ of Error (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States, to E. Clemens Horst Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California, Second Division, wherein Pabst Brewing Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ

of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 4th day of February, A. D. 1915.

WM. C. VAN FLEET,
United States District Judge. [374]

[Endorsed]: No. 15,678. United States District Court for the Northern District of California, Second Division. Pabst Brewing Co., a Corp., Plaintiff in Error, vs. E. Clemens Horst Co., a Corp., Defendant in Error. Citation on Writ of Error, and Admission of Service Thereof. Filed Feb. 13, 1915. W. B. Maling, Clerk. J. A. Schaertzer, Deputy Clerk.

Due service and receipt of a copy of the within citation is admitted this 8th day of February, 1915.

W. H. CARLIN,
DEVLIN & DEVLIN,
Attorneys for Defendant in Error.

[Endorsed]: No. 2639. United States Circuit Court of Appeals for the Ninth Circuit. Pabst Brewing Company, a Corporation, Plaintiff in Error, vs. E. Clemens Horst Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of

Error to the United States District Court of the Northern District of California, Second Division.

Filed August 20, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

[Order Extending Time to May 1, 1915, to File Record in Appellate Court, etc.]

United States Circuit Court of Appeals for the Ninth Circuit.

PABST BREWING COMPANY (a Corporation),
Plaintiff in Error,

vs.

E. CLEMENS HORST COMPANY (a Corporation),
Defendant in Error.

It appearing that the plaintiff in error (defendant in the court below) has prepared and served a proposed Bill of Exceptions to the rulings of the Court and Judge made at the trial and that the time of the defendant in error (plaintiff in the court below) to propose amendments thereto has been extended to the first day of March, 1915, and that the said Bill of Exceptions when settled and engrossed will be a necessary part of the record to be returned to this court, and good cause, therefore, being shown for the making of this order,

IT IS ORDERED that the time within which the plaintiff in error may file the record and docket the case with the clerk of this court, be and the same is hereby enlarged to and including the first day of May, 1915.

Dated February 10th, 1915.

WM. C. VAN FLEET,
Judge.

[Endorsed]: United States Circuit Court of Appeals for the Ninth Circuit. Pabst Brewing Company (a Corporation), Plaintiff in Error, vs. E. Clemens Horst Company (a Corporation), Defendant in Error. Order Enlarging Time. Filed Feb. 10, 1915. F. D. Monckton, Clerk.

[Order Extending Time to May 15, 1915, to File Record in Appellate Court, etc.]

United States Circuit Court of Appeals for the Ninth Circuit.

PABST BREWING COMPANY (a Corporation),
Plaintiff in Error,

vs.

E. CLEMENS HORST COMPANY (a Corporation),
Defendant in Error.

It being shown to the satisfaction of the Court that the proposed Bill of Exceptions heretofore served by the plaintiff in error to the rulings of the Court and the Judge made at the trial and the proposed amendments of the defendant in error thereto are in

course of settlement by agreement between the parties, and that the plaintiff in error has submitted to the defendant in error an engrossed copy of the said Bill of Exceptions as amended for the purpose of obtaining the assent of the defendant in error thereto, and that the engrossed bill probably cannot be presented to the trial judge for settlement and signature before the 15th day of May, 1915, and that the said bill of exceptions when settled and signed will be a necessary part of the record to be returned to this Court, and good cause therefor being shown for the making of this order,

IT IS ORDERED that the time within which the plaintiff in error may file the record and docket the case with the clerk of this court, be and the same is hereby enlarged to and including the 15th day of May, 1915.

Dated April 27th, 1915.

WM. C. VAN FLEET,
Judge.

[Endorsed]: United States Circuit Court of Appeals for the Ninth Circuit. Pabst Brewing Company (a Corporation), Plaintiff in Error, vs. E. Clemens Horst Company (a Corporation), Defendant in Error. Order Under Rule 16 Enlarging Time to Aug. 30, 1915, to File Record Thereof and to Docket Case. Filed Apr. 27, 1915. F. D. Monckton, Clerk.

[Order Extending Time to June 1, 1915, to File Record in Appellate Court, etc.]

United States Circuit Court of Appeals for the Ninth Circuit.

PABST BREWING COMPANY (a Corporation),
Plaintiff in Error,

vs.

E. CLEMENS HORST COMPANY (a Corporation),
Defendant in Error.

It being shown to the satisfaction of the Court that the proposed Bill of Exceptions heretofore served by the plaintiff in error to the rulings of the Court and the Judge made at the trial and the proposed amendments of the defendant in error thereto are in course of settlement by agreement between the parties, and that the plaintiff in error has submitted to the defendant in error an engrossed copy of the said Bill of Exceptions as amended for the purpose of obtaining the assent of the defendant in error thereto, and that the engrossed Bill probably cannot be presented to the trial judge for settlement and signature before the 1st day of June, 1915, and that the said Bill of Exceptions when settled and signed will be a necessary part of the record to be returned to this Court, and good cause therefor being shown for the making of this order.

IT IS ORDERED that the time within which the plaintiff in error may file the record and docket the case with the clerk of this court, be and the same is

hereby enlarged to and including the 1st day of June, 1915.

Dated May 12th, 1915.

WM. C. VAN FLEET,
Judge.

[Endorsed]: United States Circuit Court of Appeals for the Ninth Circuit. Pabst Brewing Company, a Corporation, Plaintiff in Error, vs. E. Clemens Horst Company, a corporation, Defendant in Error. Order Extending Time to File the Record and Docket Case With Clerk. Filed May 13, 1915. F. D. Monckton, Clerk.

[Order Extending Time to July 1, 1915, to File Record in Appellate Court, etc.]

United States Circuit Court of Appeals for the Ninth Circuit.

PABST BREWING COMPANY (a Corporation),
Plaintiff in Error,

vs.

E. CLEMENS HORST COMPANY (a Corporation),
Defendant in Error.

IT BEING SHOWN to the satisfaction of the Court that the proposed Bill of Exceptions heretofore served by the plaintiff in error to the rulings of the Court and the Judge made at the trial and the proposed amendments of the defendant in error thereto are in course of settlement by agreement between the parties, and that the plaintiff in error has submitted to the defendant in error an engrossed

copy of the said Bill of Exceptions as amended for the purpose of obtaining the assent of the defendant in error thereto, and that the engrossed Bill of Exceptions probably cannot be presented to the trial judge for settlement and signature before the 15th day of June, 1915, and that the said Bill of Exceptions when settled and signed will be a necessary part of the record to be returned to this Court, and good cause therefor being shown for the making of this order,

IT IS ORDERED that the time within which the plaintiff in error may file the record and docket the case with the clerk of this court, be and the same is hereby enlarged to and including the 1st day of July, 1915.

Dated May 28th, 1915.

WM. W. MORROW,
Judge.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Pabst Brewing Company (a Corporation), Plaintiff in Error, vs. E. Clemens Horst Company (a Corporation), Defendant in Error. Order Enlarging Time Within Which Plaintiff in Error may File Record and Docket the Case. Filed May 29, 1915. F. D. Monckton, Clerk.

[Order Extending Time to July 31, 1915, to File Record in Appellate Court, etc.]

United States Circuit Court of Appeals for the Ninth Circuit.

PABST BREWING COMPANY, a Corporation,
Plaintiff in Error,

vs.

E. CLEMENS HORST COMPANY, a Corporation,
Defendant in Error.

Good cause appearing therefor, it is hereby ordered that the plaintiff in error may have to and including the 31st day of July, 1915, in which time to file its record on writ of error and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated June 30, 1915.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to July 31, 1915, to File Record Thereof and to Docket Case. Filed Jun. 30, 1915. F. D. Monckton, Clerk.

[Order Extending Time to Aug. 30, 1915, to File Record in Appellate Court, etc.].

In the United States Circuit Court of Appeals, for the Ninth Circuit.

PABST BREWING COMPANY, a Corporation, Appellant,

vs.

E. CLEMENS HORST COMPANY, a Corporation, Appellee.

Good cause appearing therefor, it is ordered that the appellant may have to and including August 30th, 1915, within which to file its record on appeal and to docket the cause in the United States Circuit Court of Appeals, for the Ninth Circuit.

Dated July 29, 1915.

WM. W. MORROW,

Judge of the United States Circuit Court of Appeals.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Pabst Brewing Company, a Corporation, Appellant, vs. E. Clemens Horst Company, a Corporation, Appellee. Order Extending Time to File Record on Appeal and to Docket the Cause. Filed Jul. 29, 1915. F. D. Monckton, Clerk.

No. 2639. United States Circuit Court of Appeals for the Ninth Circuit. Six Orders Under Rule 16 Enlarging Time to Aug. 30, 1915, to File Record Thereof and to Docket Case. Refiled Aug. 20, 1915. F. D. Monckton, Clerk.